80-1348

Office-Supreme Court, U.S.
FILED
JAN 13 1981
ALEXANDER STEVAS,
CLERK

No. ----------

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF FLORIDA
DEPARTMENT OF STATE,

Petitioner,

-vs-

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

JIM SMITH
ATTORNEY GENERAL

SYDNEY H. MCKENZIE, III
CHIEF TRIAL COUNSEL
(Counsel of Record)

SUSAN E. GAMBLE
ASSISTANT ATTORNEY GENERAL

The Capitol - Suite 1501
Tallahassee, Florida 32301
Phone: 904/488-9935
Attorneys for Petitioner

QUESTION PRESENTED

I. Whether the Eleventh Amendment to the United States Constitution bars an in rem admiralty action seeking to recover property owned by a state.

TABLE OF CONTENTS

QUESTION PRESENTED I

TABLE OF AUTHORITIES IV

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 7

CONCLUSION 12

APPENDIX

1. Order of the Court of Appeals for the Fifth Circuit denying the Petition for Rehearing and Petition for Rehearing en banc on October 16, 1980. A1

2. Judgment of the Court of Appeals for the Fifth Circuit dated July 24, 1980, affirming the judgment of the District Court for the Southern District of Florida. A4

3. Opinion of the Court of Appeals for the Fifth Circuit in In Re: State of Florida Department of State v. Treasure Salvors, Inc., reported at 621 F.2d 1340 (5th Cir. 1980). A6

4. Opinion of the District Court for the Southern District of Florida in Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, reported at 459 F.Supp. 507 (S.D. Fla. 1978). A61

5. U.S. Constitution, Article III, Section 2 A164

6. Florida Statutes, Chapter 267 (1979) A166

TABLE OF AUTHORITIES

CASES

In re New York 8
256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921) and 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921)

In re State of Florida, Department of State v. Treasure Salvors, Inc. 5, 10
621 F.2d 1340 (5th Cir. 1980)

Intracoastal Transportation, Inc. v. Decatur County, Georgia 10
482 F.2d 361 (5th Cir. 1973)

Platero Ltd., Inc. v. Unidentified Remains of a Vessel 10, 11
508 F.2d 1113 (5th Cir. 1975)

Red Star Towing and Transportation Co. v. Connecticut 10
431 F.Supp. 1003 (D. Conn. 1976)

Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel 5
459 F.Supp. 507 (S.D. Fla. 1978).

Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel 4
569 F.2d 330 (5th Cir. 1978)

TABLE OF AUTHORITIES CONTINUED

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article III, Section 2 — 3

U.S. Constitution, Amendment Eleven — 5, 7, 8, 9, 10, 11

STATUTES

Florida Statutes (1979), Chapter 267 — 12

No. ----------

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF FLORIDA

DEPARTMENT OF STATE,

Petitioner,

-vs-

TREASURE SALVORS, INC.,

ARMADA RESEARCH CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OPINIONS BELOW

The following opinions of the lower courts are included in the Appendix to the Petition:

1. Opinion of the United States Court of Appeals for the Fifth Circuit, rendered July 24, 1980, in this action.

2. Opinion of the United States District Court for the Southern District of Florida, rendered August 21, 1978, in this action.

JURISDICTION

The opinion of the Court of Appeals was entered on July 24, 1980. Rehearing en banc was denied on October 16, 1980, and the mandate issued on October 24, 1980. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C., Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Article III, Section 2

> The judicial power shall extend . . ., --to all cases of admiralty and maritime jurisdiction; . . . (set out in full in the appendix hereto).

U.S. Constitution, Amendment 11

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

Florida Statutes, Chapter 267 (1979)

> (set out in full in the appendix hereto).

STATEMENT OF THE CASE

This case has its origin in an action brought pursuant to Article III, Section 2 of the U.S. Constitution (App. A164-165), conferring admiralty jurisdiction solely in the federal courts. The State of Florida was not a party to

this first action, Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) (hereinafter Treasure Salvors I) wherein it was held that the remains of a vessel lying on that part of the continental shelf outside the territorial waters of the United States were therefore not situated on lands owned or controlled by the United States under the provisions of the Antiquities Act. This established title to the vessel and its cargo in the Respondent as against the United States only.

The instant case arose through ancillary process issued by the district court pursuant to the Court of Appeals' decision in Treasure Salvors I. The district court issued a warrant for

arrest in rem, directing the marshal to take possession of all artifacts from the vessel in the custody or control of the State of Florida's Division of Archives office in Tallahassee. On August 21, 1978, the district court entered final judgment in behalf of the Respondent. In a Memorandum Order reported at 459 F.Supp. 507 (S.D. Fla. 1978) (App. A61-163), the court found the Eleventh Amendment inapplicable to a suit to determine title to artifacts, and directed the State of Florida to relinquish possession of the artifacts to the district court.

The Court of Appeals affirmed the decision of the district court as to jurisdiction over the State on July 24, 1980 (Rubin, J. dissenting). In re State of Florida Department of State v.

Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. 1980) (hereinafter Treasure Salvors II) (App. A6-60). Florida's petition for rehearing en banc was denied October 16, 1980, and the mandate issued on October 24, 1980 (App. A1-5).

The importance of this petition for writ of certiorari to Court of Appeals is monumental, for the issue of subjecting a state to such suits and requiring it to relinquish property under the guise of an admiralty action in rem has far-reaching ramifications not only in the circumstances of this action, but in any case wherein a state seeks to retain title and possession of its archaeological and historical resources.

ARGUMENT

This Court should grant its Writ of Certiorari to review the decision of the Court of Appeals because the Court has in effect decided that if there is a controverted claim of state ownership of property, the controversy becomes an appropriate subject for admiralty jurisdiction and the district court may hear the case.

The State of Florida contends that it has title to the property within the jurisdiction of the court pursuant to contracts in which Treasure Salvors agreed to relinquish twenty-five percent of the items recovered from a sunken Spanish galleon in return for the right to salvage on state sovereignty submerged lands; therefore the Eleventh Amendment

deprived the district court of jurisdiction to adjudicate the State's title or lack of it. The Court of Appeals affirmed the District Court's ruling that the Eleventh Amendment did not preclude an action to recover the artifacts in the possession of the State, and ordered it to turn over all such items to Treasure Salvors.

This action has been styled as an in rem proceeding in admiralty; however, the thrust of the Respondent's claim is simply to bring suit to recover property from the State of Florida. As pointed out in the dissenting opinion of Judge Rubin, the Eleventh Amendment is equally applicable to admiralty actions, and neither of the companion cases relied upon by the panel majority, In re New

York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921) and 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921) holds that a state may be involuntarily divested of title to property in its possession. Instead, the Supreme Court in those cases held that the State's suggestion of ownership, in the absence of a special challenge, triggered the application of the Eleventh Amendment and thus the district court's jurisdiction came to an end. However, Judge Rubin, in his dissent below, stated:

> . . . I do not understand this to imply that, if there is a controverted claim of state ownership, the controversy becomes an appropriate subject for admiralty jurisdiction. Such a conclusion is particularly difficult to reconcile with the Eleventh Amendment when, as here,

> the determination of ownership involves the adjudication of an underlying contract dispute between a citizen of a state and the state itself, a purely local question.

Treasure Salvors II, at 1350-51 (App. A53-54).

Indeed, the panel majority of the Court of Appeals simply holds that an in rem admiralty action may be brought to recover property from a state, but fails to distinguish its prior decisions which directly hold that a state may invoke its Eleventh Amendment defense in admiralty actions. Intracoastal Transportation, Inc. v. Decatur County, Georgia, 482 F.2d 361 (5th Cir. 1973); Platero Ltd., Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (5th Cir. 1975). See also Red Star Towing and Transportation Co. v. Connecticut, 431 F.Supp. 1003

(D. Conn. 1976). Thus, the ultimate result of this decision is that a citizen in a contract dispute with a state may recover property from the state so long as there is some implied admiralty issue.

The application of the Eleventh Amendment to admiralty actions against states for the recovery of property is of special significance not only to the State of Florida in this petition, but to all states which have extensive historical coastal interests. See, i.e., Platero Ltd., Inc. v. Unidentified Remains of a Vessel, supra. If the Court of Appeals is allowed to recede from its previous construction of the Eleventh Amendment's application to suits in admiralty, then the historical

preservation efforts of all coastal states are jeopardized. See Chapter 267, Fla. Stat. (1979) (App. A166-219).

CONCLUSION

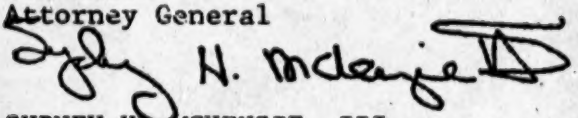
The question of bringing a state into federal court to test its title to property far transcends the artifacts which are involved in this case, and goes to the fundamental constitutional protections afforded the states. As pointed out in Judge Rubin's dissent, the decision of the Court of Appeals summarily disposes of this issue without distinguishing prior holdings, and the resulting confusion wrought by the Court's decision merits the granting of certiorari.

For the foregoing reasons, Petitioner respectfully urges this Court

to grant certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JIM SMITH
Attorney General



SYDNEY H. MCKENZIE, III
Chief Trial Counsel

SUSAN E. GAMBLE
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, Florida 32301
Phone: 904/488-9935

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2950

IN RE: STATE OF FLORIDA,
DEPARTMENT OF STATE,
Petitioner-Appellant,

versus

TREASURE SALVORS, INC.,
a corporation and ARMADA
RESEARCH CORP., a corporation,
Plaintiffs-Appellees,

THE UNIDENTIFIED WRECKED AND
ABANDONED SAILING VESSEL, ETC.,
Defendant.

- - - - -

Appeal from the United States
District Court for the
Southern District of Florida

- - - - -

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 24, 1980, 5 Cir., 198_, _____F.2d ____).

(OCTOBER 16, 1980)

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

(XX) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/ Sam D. Johnson
United States Circuit Judge

Form 704-2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2950

D. C. Docket No. 75-1416-Civ-WM

IN RE: STATE OF FLORIDA, DEPARTMENT OF STATE,

Petitioner-Appellant,

versus

TREASURE SALVORS, INC., a Corporation, AND ARMADA RESEARCH CORP., a Corporation,

Plaintiffs-Appellees,

THE UNIDENTIFIED WRECKED and ABANDONED SAILING VESSEL, Etc.,

Defendant.

Appeals from the United States District Court for the Southern District of Florida

Before GEWIN, RUBIN AND SAM D. JOHNSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the

United States District Court for the the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

July 24, 1980

ALVIN B. RUBIN, Circuit Judge, dissenting:

Issued as Mandate: OCT 24 1980

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-2950

IN RE: STATE OF FLORIDA
DEPARTMENT OF STATE,

Petitioner/Appellant,

VERSUS

TREASURE SALVORS, INC., etc.,

Plaintiffs/Appellees,

THE UNIDENTIFIED, WRECKED AND
ABANDONED SAILING VESSEL, ETC.,

Defendant.

Appeal From the United States
District Court For the Southern
District of Florida

(July 24, 1980)

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

SAM D. JOHNSON, Circuit Judge:

This appeal offers this Court its second opportunity to determine ownership rights in artifacts recovered from the Spanish vessel, Atocha. In this Court's first opinion, Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) (hereinafter Treasure Salvors I), it was held that Treasure Salvors and Armada Research Corp.[1] had title to the vessel and its cargo as against the United States. In the instant case this Court affirms the district court's holding that these two Florida corporations have

[1] These two corporations will be referred to as Treasure Salvors in this opinion.

title to various artifacts as against the State of Florida.[2]

Facts

The historical backdrop for this case was detailed in Treasure Salvors I, 569 F.2d at 333, and was the subject of a National Geographic article, Lyon, The Trouble with Treasure, 149 National Geographic 787 (June 1976), but is well worth repeating. This case dates back to the early 17th Century, when Spain was

[2]In November 1975, plaintiffs issued and published a monition against all potential claimants of the vessel and its cargo, admonishing them to file their claims to the vessel. Only two parties did so--the United States and Florida. On April 4, 1978, this Court issued a mandate affirming the district court's judgment in Treasure Salvors I, as modified, against the United States. On May 3, 1978, the district court issued a default judgment against all potential claimants who had not filed their claims and barred and precluded filing any further claims to the vessel.

using the riches of the New World to finance her European military adventures. On September 4, 1622, a fleet of 28 ships, known as the Tierra Firme Flota,, commanded by the Marquis of Cadereita, set sail from Havana for Cadiz laden with bullion, spices, and tobacco for King Phillip IV. As the ships entered the Florida Straits in search of the favorable Gulf Stream currents, bad weather set in, and the vessels soon found themselves in the midst of a hurricane. The destructive winds from the northeast stripped the vessels of their masts, sails, and standing rigging. The winds then shifted to the south and eight of the ships were driven toward the dangerous waters of the lower Florida Keys, where they were soon lost. The remaining vessels limped back to Havana. One of

the eight ships that went down was the Nuestra Senora de Atocha. When the Atocha set sail from Havana, she was carrying in excess of one million pesos of registered bullion and specie. Her hold contained a treasure worth of Midas: 160 gold bullion pieces, 900 silver ingots, over 250,000 silver coins, 600 copper planks, 350 chests of indigo and 25 tons of tobacco.[3]

The Spaniards began a salvage effort as soon as the news of the disaster reached Havana. Under the direction of Captain Gasper de Vargas, the salvors located the Atocha intact in 55 feet of water, with her mast peering above the surface. The divers, however, were

[3]In 1978, this cargo was valued at $250 million. Today's meteoric rise in the price of precious metals has undoubtedly substantially increased the present value of the Spaniards' booty.

unable to enter the holds containing the treasure, as they were all battened down. Only two bronze cannons from the upper deck of the stern castle could be retrieved.

De Vargas opted to place surface buoys to mark the position of the Atocha and sail west to salvage the Rosario, another of the eight vessels that sank in the hurricane. In early October, another hurricane ravaged the Lower Keys, breaking up the hull of the Atocha and spreading her treasure beneath the sands. When Vargas returned, he found the storm had removed the protruding mast and his surface buoys. He was unable to relocate the vessel.

Early in 1623, the Marquis of Cadereita sailed from Havana to

personally supervise the search.[4] The continued efforts proved fruitless. Finally, in late 1623, the Spaniards abandoned the search.

The Cuban authorities, however, did not give up hope. They continued to keep the general area buoyed in anticipation of future salvage efforts.[5] In 1626, Francisco Nunez Melian began searching for the Atocha and Santa Margarita under a Royal salvage contract. Using state of the art equipment, including a 600 pound bronze diving bell with windows, Melian was able to find the Santa Margarita and,

[4]The Marquis directed the salvage operation from his camp on one of the nearby keys. These keys were named "Cayos de Marques" after the Marquis and today are known as the Marquesas Keys.

[5]In 1625 another vessel was lost and all the crew members perished in this continuing effort to mark the location of the treasure-laden vessels.

over four years, salvage her cargo. Dutch raiding parties, hostile Indians,[6] and political opportunities[7] eventually brought the search for the Atocha to a close in 1641. Finally, in 1683, the Spanish House of Trade published a list of ships still missing. The Atocha headed the list. Melian's salvage accounts were sent from Havana to the Archive of the Indies in Seville, and the Atocha passed into history.

Over three centuries later, in the mid-1960's, treasure searchers renewed their efforts to locate the Atocha and her rich treasure. By 1968, the search

[6]The Indians burned a salvage vessel that floundered just off the Marquesas Keys and, eventually, the Spanish salvage camp.

[7]Melian was appointed Governor at Caracas. Captain Juan de Anvez continued the salvage of the Santa Margarita, but only occasionally searched for the Atocha.

was concentrated in the Middle Keys, near Upper Matecumbe Key. This area was isolated by the searchers after pouring through the Spanish archival records in Seville.[8] Years of searching yielded nothing.

Finally, in the late 1960's, Dr. Eugene Lyon, working as a consulting historian for Treasure Salvors, uncovered documentary evidence which indicated to him that the current salvage efforts were directed at the wrong set of keys. He discovered that "Matecumbe" was a general term used to denote the Florida Keys, as a whole. A thorough search of Melian's

[8]Documents drafted at the same time as the Atocha went down indicated that the vessel sank near "Matecumbe." Searchers concentrated their efforts in the Middle Keys, hoping that the "Matecumbe" referred to in the original documents corresponded to the modern key bearing that name.

salvage records revealed that the search for the Atocha had centered near "Cayos del Marques." This placed the wreck of the Atocha somewhere between the Dry Tortugas and Sand Key in the Lower Keys.

Once Dr. Lyon ascertained what he believed to be the correct general area of the Atocha's watery grave, "all" that remained for Treasure Salvors was to pinpoint the exact location. It was a task easier said than done. For one year they searched some 120,000 nautical miles of seabed 24 hours a day before detecting a large galleon-size anchor in the spring of 1971. Additional shipwreck material was recovered in the immediate vicinity of the anchor. Soon the wreck was

identified as part of the break-up of the Atocha.[9]

In April 1971, Treasure Salvors and the State of Florida executed a one year contract allowing Salvors to conduct their underwater salvage operations on the Atocha. Both parties entered into this agreement under the belief that the Atocha was resting on land owned by Florida. Eventually, four contracts were signed (the last in November 1974) each running about one year. Under the contracts, the State was entitled to 25% of the finds. In June 1973, Florida's

[9]The wreck site is located near some shoals known as the "Quicksands," nine and one half nautical miles west of the Marquesas Keys and forty nautical miles west of Key West. Those mariners familiar with this area will recognize it as being in the heart of a Naval Operational Training Area and only three nautical miles west of a Bombing and Strafing Target Area.

Division of Archives in Tallahassee received its share[10] of the first batch of artifacts recovered by Treasure Salvors. In February 1975, the Salvors delivered what turned out to be the State's last batch.

The Atocha's legal odyssey began with the Supreme Court's decision in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375 (1975). The Court affirmed the report of Special Master Maris, rejecting Florida's ownership claim of submerged lands, including that part of the continental shelf on which the Atocha rests. The report established that Florida had never owned

[10]Treasure Salvors kept many of the artifacts recovered at their corporate headquarters, a 168 foot reconstructed galleon anchored at the foot of Margaret Street in Key West, Florida. The precious stones were kept in a safety deposit box in Key West.

an interest in any of the lands involved in the case at bar. On July 18, 1975, four months after the Supreme Court's holding, Treasure Salvors filed an in rem action in the Southern District of Florida for possession or confirmation of title to the abandoned vessel believed to be the Nuestra Senora de Atocha.

The United States intervened in the action and asserted title to the vessel. The district court entered judgment for Treasure Salvors and this court affirmed the trial judge's ruling that as between Treasure Salvors and the United States, Treasure Salvors had title to and right to possession of the vessel and its cargo. Treasure Salvors I.

The State of Florida initially refrained from intervening in the action. Instead, the State prepared for the

eventuality of a judgment in favor of the federal government. Florida assisted the United States in the lawsuit[11] and entered into preliminary negotiations regarding the disposition of the Atocha's treasure should the federal government prevail.[12] The adverse judgment left Florida in the cold.

In April 1978, after this Court's judgment for Treasure Salvors, the district court issued a warrant for arrest in rem. The warrant directed the marshal

[11]An attorney for the Florida Secretary of State, the agency that administers the Division of Archives, worked with the federal government on the case and monitored, for Florida, the progress of the litigation.

[12]The Division of Archives was negotiating with the Department of the Interior during the course of the litigation for an antiquities permit. Apparently, if the United States had been successful, the Division would have received an antiquities permit for the wreck site.

to take possession of all artifacts from the vessel in the custody or control of the State's Division of Archives' office in Tallahassee.[13] Florida filed a motion to quash the arrest warrant and successfully sought an emergency stay of the district court's order from this Court. In Re: State of Florida, Department of State, No. 78--1763 (5th Cir. April 12, 1978). In accordance with this Court's order, on April 14, the district court stayed the execution of the arrest warrant.

This temporary ban on the execution of the warrant for arrest did not halt the legal maneuvers. The district court

[13]Tallahassee is located in the Northern District of Florida. The marshal was instructed to bring the remnants of the vessel and her cargo into the custody of the district court in the Southern District.

denied Florida's motion to quash the warrant and granted Treasure Salvors' motion of April 17 to require the State of Florida to show cause[14] why it should not be ordered to transfer the artifacts in its possession to the custodians appointed by the district court.[15] The State answered, asserting that the court lacked jurisdiction and that Florida owned the artifacts in the possession of the Tallahassee office of the Division of Archives. On July 27 and 28 the district judge held a full evidentiary hearing on

[14]This order to show cause is known as ancillary process. Supplemental Admiralty Rule C(5).

[15]The district judge had previously appointed Treasure Salvors substitute custodians. Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, No. 75--1416 (S.D.Fla., Oct. 28, 1975).

the jurisdictional issues and the merits of the order to show cause.[16]

After the hearing, the district judge filed a Memorandum Order containing extensive findings of fact and conclusions of law. 459 F.Supp. 507. The judge found that the order to show cause was properly issued. The court then held that the State of Florida was bound by the earlier judgment in Treasure Salvors I. Alternatively, the trial judge held that the suit to determine title to the artifacts was not barred by the eleventh amendment and that Florida's claim of ownership was without merit. The trial judge directed the State to deliver the

[16]In order to expedite the litigation, Treasure Salvors agreed to allow the Division of Archives to serve as temporary custodian of the disputed artifacts.

artifacts to the district court. The State of Florida then instituted this appeal. This Court is persuaded that the district court's alternative holding is correct, and we affirm.[17]

Eleventh Amendment

Florida's initial jurisdictional contention is that the order to show cause directed at the Division of Archives is barred by the eleventh

[17]This Court declines to either affirm or reverse the trial judge's innovative res judicata analysis. The preclusion issues raised by the district court's opinion are reserved for another day.

amendment.[18] The State asserts that it owns the artifacts in dispute and thus the district court's attempt to adjudicate ownership is, in essence, a suit against a state. Florida argues that since it has not waived its eleventh amendment protection by voluntary assertion of a claim or defense, see Gardner v. New Jersey, 329 U.S. 565, 67

[18]U.S. Const. amend. XI provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the eleventh amendment is not literally applicable to suits against a state by her own citizens, the Supreme Court has construed the amendment to cover such actions. Edelman v. Jordan, 415 U.S. 651, 662, 663, 677 n. 19, 94 S.Ct. 1347, 1355, 1362 n. 19, 39 L.Ed.2d 662 (1974).

S.Ct. 467, 91 L.Ed. 504 (1947), the district court lacked jurisdiction.

The Supreme Court has held that the eleventh amendment applies to admiralty in rem actions. In re State of New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). In a companion case, In re State of New York, 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921), the Court provided guidance for evaluating eleventh amendment claims in admiralty in rem actions.

In that case the administrators of Evelyn McGahan's estate filed a libel in admiralty against a tug, the Queen City, alleging that the negligent operation of the tug caused McGahan's death. The State of New York entered a special appearance and filed a verified affidavit suggesting that the district court lacked jurisdiction because the vessel was the

State's property, and had been in its possession and control at the time of the accident. The libelants offered nothing to controvert the State's affidavits. The district court rejected New York's claim of immunity and the Supreme Court reversed.

The Court first focused on the district judge's refusal to accept the State's assertion of ownership. "We deem it clear . . that the verified suggestion presented by the Attorney General of that state . . ought to be accepted as sufficient evidence of the fact [of ownership], at least in absence of a special challenge." Id. at 509 (emphasis added). The Court held that the district judge, given the uncontroverted claim to the vessel, should have acknowledged the State's ownership. It went on to con-

clude that admiralty in rem process cannot be issued on public property of a state "used and employed for public and governmental purposes." Id. at 511.

The Queen City tells us that when a state submits uncontroverted evidence of ownership in an admiralty in rem action, the district court is bound to accept the assertion and apply the eleventh amendment accordingly. In the case at bar, however, we have a controverted claim of ownership. Treasure Salvors offered evidence and legal arguments to show that it, and not Florida, owned the artifacts from the Atocha. Such an offer is the "special challenge" that the Supreme Court envisioned in the Queen City. This challenge operates to rebut the presumption of validity attributed to a state's ownership claim.

Once an appropriate challenge is made, a district judge is no longer compelled to conclude that the state owns the res in dispute. Instead, the Court must make a jurisdictional determination very similar to that made in the classic "jurisdiction to determine jurisdiction" line of cases. In that genre, the pivotal jurisdictional question involves essentially the same analysis as is posed by the merits of the case. See United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed.2d 884 (1957). Where "the issue of jurisdiction is inextricably intertwined with the merits of the controversy," the court retains the case and resolves the issue, since federal courts "always have jurisdiction to determine our jurisdiction." Nestor

v. Hershey, 425 F.2d 504, 511 (D.C.Cir. 1969).[19]

In the case at bar, ownership of the salvaged items is determinative of both the eleventh amendment and the merits. Since we agree with the trial court's assessment that Florida lacks an ownership interest in the artifacts, see pp. 1348-1349 infra [A43-50], we affirm the judge's holding that the order to show

[19]This approach is especially desirable in admiralty in rem actions. Federal courts have exclusive jurisdiction over admiralty in rem proceedings. Madruga v. Superior Court of California, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954), G. Gilmore and C. Black, The Law of Admiralty § 1-13 (2d ed. 1975). If the mere assertion of ownership by a state of a res was sufficient to invoke the eleventh amendment, petitioners such as Treasure Salvors would find themselves stranded without a forum in which to litigate their claim.

cause is not, in this case, a suit against a state.[20]

Jurisdiction and Process

Given the lack of eleventh amendment and sovereign immunity problems, it must be determined whether the district court had the power to issue the "show cause order" and adjudicate the merits of the ownership claims. A careful analysis of the record establishes that admiralty jurisdiction provided the district court a firm foundation for its actions.

Admiralty in rem jurisdiction generally requires that the res be present in the district when the suit is filed or during the pendency of the

[20]Our holding that this action does not involve a suit against a state also disposes of Florida's claim that it has not waived sovereign immunity.

action.[21] Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113, 1115 (5th Cir. 1975). The fact that a res was at one time within the district is insufficient to establish in rem jurisdiction. Id. at 1116. The crux of the State's argument is that the artifacts in dispute were not present in the Southern District of Florida when this litigation began back in 1975 and never were present in the Southern District at any time during the litigation. Given the general requirement of presence, the absence of the items in dispute, the State argues, deprive the

[21] In Treasure Salvors I this Court held that a party may waive the requirement that a res be present within the district and consent to a court's admiralty in rem jurisdiction. 569 F.2d at 335. Florida, however, has not consented to waive the usual jurisdictional requirements.

district court of in rem jurisdiction and thus the power to issue the order to show cause and adjudicate the ownership interest in the particular artifacts held in Tallahassee.

The State misconceives the nature of the district court's exercise of jurisdiction. It is undisputed that most of the artifacts recovered from the Atocha were present in the Southern District of Florida when the litigation began.[22] The district court clearly had the power to adjudicate the ownership of the artifacts located in its district. The issue before this Court is whether the presence

[22]Under the salvage contract between Treasure Salvors and Florida, Florida received 25% of the finds. Treasure Salvors kept its share of the artifacts recovered either at its headquarters in Key West or in a bank in Key West. See note 9 supra.

of the artifacts in the Southern District provided a sufficient foundation for the trial judge's order to show cause aimed at artifacts being held by the State in the Northern District of Florida. It is this Court's conclusion that the trial court was authorized to issue ancillary process in this case by Supplemental Admiralty Rule C(5).

Rule C(5)[23] provides that where

[23]Supplemental Admiralty Rule C(5):
(5) Ancillary Process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

in rem process has already been served and where part of the property that is the subject of the action is not within the control of the court "because it has been removed or sold," the court may order the party in possession to show cause why the property should not be delivered to the custody of the marshal. Rule C(5) goes on to state that after the show cause hearing, "the court may enter such judgment as law and justice may require."

There is no doubt that in rem process was served with respect to the salvaged articles from the Atocha, and some of the artifacts were not within the Southern District because they had been removed to the Northern District pursuant to the contract between Florida and Treasure Salvors. In this case, these

facts alone do not justify the show cause order directed at the Division of Archives. It must also appear that: (1) the district court had control over a sufficient amount of the res to justify ancillary process and (2) ancillary process can be issued outside the district.

The rulemakers only contemplated the use of ancillary process where the major portion of the res is within the control of the court. See Notes of Advisory Committee on Rules, 28 U.S.C.A. Supplemental Rule C (1970); 7A Moore's Federal Practice ¶C.15 at 700.4, 700.5 (2d ed. 1979); The George Prescott, 10 Fed.Cas. 222 (E.D.N.Y. 1865) (holding that under Admiralty Rule 9 ancillary process can reach property appurtenant to the arrested res, even though the property was removed from the res prior to seizure).

The draftsmen did not intend to allow the presence of a portion of a res to support the issuance of ancillary process when the majority of the res is located outside the district. 7A Moore's supra at 700.4. Given the general requirement of presence of the res to support in rem jurisdiction, a rule allowing a small part of the res to support issuing ancillary process against the major portion of the res would be to allow the proverbial tail to wag the dog. Jurisdiction over the extra-territorial portion of the res in such a situation can only be obtained by original process. Id.

For the purposes of ancillary process, it is apparent that the district court in the case at bar had "control" over a sufficient portion of the res to warrant the use of ancillary process. In

making the sufficiency determination, the district court properly was entitled to consider the main body of the Atocha (that part still resting on the continental shelf) as being within its "control." The bulk of the Atocha lay buried in international waters forty nautical miles off the Florida coast, not in another district. The district court did everything possible to bring the vessel within its control.[24] Indeed, as a practical matter, it was impossible to bring the remainder of the vessel within any court's territorial jurisdiction on

[24]The court ordered the marshal to arrest the vessel and bring it within the court's physical control. Alternatively, the court appointed Treasure Salvors as custodian of the vessel "for possession and safekeeping . . . until further order of this court." On the facts of this case, this virtually placed the vessel in custodia legis. Treasure Salvors I, 569 F.2d at 335, n.5.

reasonable notice. Finally, there was little danger that significant portions of the res could escape an in rem decree. Treasure Salvors I, 569 F.2d at 335. In light of the realities of the situation, the district court's assessment that it had control over a sufficient portion of the Atocha was correct and this was a proper case for ancillary process. Cf. Id. at 334 (Admiralty in rem jurisdiction is a legal fiction designed to aid courts in "finding the most practical and efficacious means of resolving the disputes before them").

Even given that this was a proper case for ancillary process, it must still be ascertained whether ancillary process may be issued outside the district but

within state boundaries.[25] This determination hinges on the applicability of Supplemental Admiralty Rule E(3)(a).

Rule E(3)(a) provides:

> (3) Process.
>
> (a) Territorial Limits of Effective Service. Process in rem and of maritime attachment and garnishment shall be served only within the district.

(emphasis added). In the Advisory Notes the draftsmen, in commenting on Rule E(3)(a), stated that "process requiring seizure of property should continue to be served only within the geographical limits of the district." Notes of Advisory Committee on Rules, 28 U.S.C.A. Supplemental Rule E (1970) (emphasis added). Ancillary process, however, does

[25] We pass no judgment, one way or another, on whether ancillary process may be effectuated across state lines.

not require the seizure of property. Rule C(5). The rulemakers appear not to have intended for Rule E(3)(a) to govern ancillary process.

There are two policy reasons that also support the conclusion that Rule E(3)(a) does not govern ancillary process. First, as the district judge noted, limiting ancillary process to the district would produce a multiplicity of lawsuits. 459 F.Supp. at 519. New lawsuits would have to be filed in each district to which a portion of the res had been removed. Such a procedure could hardly be classified as a valuable expenditure of judicial resources. Second, "to the extent a decree in rem may be said to affect all the normal incidents of the arrested res, it may be necessary to give extraterritorial effect to

ancillary process to enable the court to bring within its control all property its decree will affect." 7A Moore's, supra at 700.10. The Advisory Committee Notes and policy rationales compel the conclusion that Rule E(3)(a) was not designed to govern ancillary process.

Supplemental Admiralty Rule A provides that the general Rules of Civil Procedure govern actions in rem in the absence of a contrary Supplemental Rule.[26] Federal Rule 4(f) controls the general rule concerning the territorial

[26]Supplemental Admiralty Rule A, in pertinent part, states:

> The general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

limits of process.[27] In accordance with Supplemental Rule A, Federal Rule 4(f) controls the limits of effective service in the case at bar. Rule 4(f) states that all process, other than subpoenas,

[27]Federal Rule of Civil Procedure 4(f) provides:

(f) Territorial Limits of Effective Service. All Process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or crossclaim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

may be served anywhere within the boundaries of the state in which the district court is located. Ancillary process here was served on the Division of Archive's [sic] office, located in the northern part of the state. Rule 4(f) was satisfied.

In sum, the trial judge had jurisdiction to issue ancillary process, and the process was effectuated within the state in accordance with Federal Rule 4(f). The trial court properly reached the merits of the dispute.

The Merits

Finally, this Court's attention is directed to Florida's contention that the district court erred in holding that the State had no interest in the artifacts from the Atocha and ordering the transfer of the items to the marshal for

delivery to Treasure Salvors. A careful review of the record and the basic legal principles of contract law compel the conclusion that the trial court's order should be affirmed.

The facts underlying the merits of this case are quite simple. Beginning in 1971, Treasure Salvors and the State of Florida entered into a series of annual contracts governing the salvage of the Atocha. Both parties entered into these agreements under the impression that the seabed on which the Atocha lay was state land. Treasure Salvors agreed to relinquish 25% of the items recovered in return for the right to salvage on state lands. In 1975 the Supreme Court, in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375 (1975), held that the part of the continental

shelf on which the Atocha was resting had never been owned by Florida. It was at this point that Treasure Salvors sought to be declared owner of the Atocha.

Even the briefest of glances at these facts cannot help but invoke thoughts of the doctrine of mutual mistake[28] and call to mind the seminal case of Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887). Sherwood involved the classic remedy, "replevin for a cow." Plaintiff had agreed to purchase Rose 2d of Aberlone from defendants for $80. When the plaintiff tendered the money, the sellers refused to accept it and declined to yield Rose. At trial the

[28]In determining the existence of mutual mistake, there are no principles peculiar to admiralty. Sicula Oceanica S.A. v. Wilmar Marine Engineering & Sales Corp., 413 F.2d 1332 (5th Cir. 1969).

sellers introduced evidence establishing that at the time of the argument both parties thought Rose was barren and could not breed. Only in the interim, between the agreement to sell and the buyer's tender of the funds, was it discovered that Rose was with calf.[29] This mistake, sellers argued, went to the root of the parties' agreement. The Michigan Supreme Court agreed and allowed the sellers to avoid their contractual obligation.

The case at bar presents another example of mutual mistake. The parties entered into the salvage contracts under the mistaken assumption that the State of Florida owned the land. But for this belief, the Division of Archives and

[29]Rose, with calf, was worth approximately seven times as much as a barren Rose.

Treasure Salvors would not have executed the agreements. The trial court correctly held that the parties made a mutual mistake.

The facts of this case also raise the common law doctrine of failure of consideration.[30] Courts have long been reluctant to delve into the adequacy of consideration. See e.g., Sir Anthony Sturlyn v. Albany, 1 Cro.Eliz. 67 (Q.B. 1587); Westlake v. Adams, 5 C.V. (N.S.) 248, 265 (C.P. 1888) ("It is an elementary principle, that the law will not enter into an inquiry as to the adequacy of consideration . . .."). A different approach, however, has been taken where there is a failure of consideration.

[30]Like mutual mistake, there are no principles of failure of consideration peculiar to admiralty. [See A45, n. 28, supra].

> The law aptly terms an agreement to do an act or to pay money or other thing where there is no consideration for it a nudum pactum--a naked agreement--a promise without legal support, which the law will not enforce, no matter whether verbal or written, or however earnestly and solemnly made.

Jones v. McCallum, 21 Fla. 392, 393, 395 (1885).

In the case at bar we have a failure of consideration. In return for 25% of the finds, the State of Florida offered Treasure Salvors the "right" to conduct a salvage operation on lands in which the state had no interest. There was a promise without legal support.

Where there is a failure of consideration, the injured party is free, upon discovery, to rescind the agreement and recover back what he has paid. See

United States v. Haynes School Dist. No. 8, 102 F.Supp. 843 (E.D.Ark.1951). Treasure Salvors sought to rescind the contracts and recover back all the artifacts as soon as United States v. Florida was handed down. The district judge was acting well within his authority when he ordered the Division of Archives to deliver the artifacts in its possession to the marshal so that the salvaged items might be transferred to Treasure Salvors.

The State argues that the contracts between the parties should be declared valid because, at the time they were executed, the Florida Constitution stated that Florida owned the submerged lands holding the Atocha. In United States v. Florida, however, the Supreme Court held that this ownership claim was without

merit and that the lands never belonged to Florida. A holding that the State's incorrect claim of ownership is sufficient to support the contracts would operate to overturn the doctrines of mutual mistake and failure of consideration. The invitation to do so must be declined.[31]

Conclusion

The district court had jurisdiction pursuant to Supplemental Admiralty Rules (C)(5) and (A) to issue the "show cause order" and adjudicate the merits of the State's ownership claim. Neither the eleventh amendment nor sovereign immunity prohibited such action. This Court's re-

[31]There is some philosophical support for the position advocated by the State. See R. Descartes, Discourse on Method (1637) ("Cogito, ergo sum"--"I think, therefore I am.")

view of the record reveals that the trial judge's conclusion that the State did not have an ownership interest in the artifacts is correct. The judgment of the district court is

AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, dissenting:

Respectfully, I dissent from the conclusion reached by my brethren that the district court had jurisdiction. Because the State of Florida contended that it had title to the property within the jurisdiction of the court, the eleventh amendment deprived the district court of jurisdiction to adjudicate the State's title or lack of it. Moreover, if the district court was not barred from asserting jurisdiction by the eleventh

amendment, it lacked in rem jurisdiction over the wreck.

The Eleventh Amendment is sweeping:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ."

While the amendment in terms applies only to suits by citizens of another state, it also precludes jurisdiction over a suit by the citizens of a state against that state. Hans v. Louisiana, 134 U.S. 1, 3, 10 S.Ct. 504, 505, 33 L.Ed. 842 (1890).

Although, in briefs, the State of Florida does assert that it owns the artifacts in dispute, it has not waived its eleventh amendment immunity. It correctly asserts that the plaintiffs cannot

bring it into a federal court to test its title to the artifacts.

Neither of the cases known as In re New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921) and 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921), holds that a state can be brought involuntarily into an admiralty court for an adjudication of its property rights. In those cases, a tug had been libelled in a federal court. The state asserted an uncontroverted claim to ownership of the tug and intervened. The Supreme Court held [sic] the admiralty court could not issue in rem process against public property of the state. While it said, in reaching this conclusion, that the state's suggestion of ownership ought to be accepted in the absence of a special challenge, I do not understand this to

imply that, if there is a controverted claim of state ownership, the controversy becomes an appropriate subject for admiralty jurisdiction. Such a conclusion is particularly difficult to reconcile with the eleventh amendment when, as here, the determination of ownership involves the adjudication of an underlying contract dispute between a citizen of the state and the state itself, a purely local question.

The doctrine that a court has jurisdiction to determine its own jurisdiction does not permit it to decide the merits of a suit against the state. Once the state appears and asserts title to the property in dispute the court's jurisdiction is ended. In essence, the suggestion by my brethren that the court can determine whether it has jurisdiction of

a suit over state-claimed property by looking to the merits is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses.

The decision in Tindal v. Wesley, 167 U.S. 204, 17 S.Ct. 770, 42 L.Ed. 137 (1897) is not apposite here because the judgment in that dispute did not determine the rights of the state. In deciding that a claimant to property might sue persons preventing him from obtaining possession even though the possessors held the property on behalf of the state, the court reasoned that this was not an action against the state within the meaning of the Constitution because judgment would not conclude the state. Id. at 221, 17 S.Ct. at 777. Here the district court did precisely what was implicitly

forbidden by Tindal: it concluded the state from claiming ownership of the property.

It is, I think, arguable that under Tindal the writ of arrest of the salvaged articles was proper because it was directed to certain named individuals and simply brought the articles into possession of the court. However, when the court went on to adjudicate the ownership of these articles, it determined a claim against the state. It decreed that Treasure Salvors and Armada Research Corporation have full title to the salvaged articles and that the contract under which the state had possessed some of the salvaged treasure was invalid. It seems to me that this is the precise result barred by the eleventh amendment.

Our decision on the first appeal is not res judicata of this claim. We there expressly modified the district court's order adjudicating title to Treasure Salvors as against all other possible claimants and limited the effect of the decree saying,

> . . . the district court properly adjudicated title to all those objects within its territorial jurisdiction and to those objects without its territory as between plaintiffs and the United States. In affirming the district court, we do not approve that portion of its order which may be construed as a holding that plaintiffs have exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claimants, if any there be, who are not parties or privies to this litigation. (Emphasis supplied.)

569 F.2d at 335-36.

The district court found that the State of Florida was bound by the decree on the basis that it was privy to the litigation because it had stood by, let the United States litigate and failed to intervene. These actions are not, in my opinion, sufficient to make the State of Florida either a party to this litigation or privy to it. The United States asserted a counterclaim; Florida did not. If the United States had succeeded, it would have been decreed owner of the property; Florida could not have been. Florida was doubtless interested in the success of the United States, and hoped to benefit if the federal government were decreed to be owner. This bystander's interest in the success of one litigant over another is not equivalent to consent to a decree adjudicating the bystander's

title rights. Therefore, I cannot find that Florida's rights are determined by the district court's prior judgment, as modified by us.

In addition to lacking jurisdiction to adjudicate Florida's claim, the district court also was without in rem jurisdiction over a wreck that lay beyond the contiguous waters. See United States v. Williams, 617 F.2d 1063, 1073 (5th Cir. 1980) (en banc) for a definition of the extent of these waters. The court did everything it could to obtain jurisdiction, but the fact remains that the wreck was not within its territorial domain or, so far as the record shows, within the jurisdiction of any other sovereign. There are indeed res that lie beyond the jurisdiction of any court to determine in rem ownership. The waters

of the ocean are wide and deep. Many objects may sail on the ocean, float in it or lie at the bottom outside the in rem jurisdiction of any court.

This does not mean that disputes must go unadjudicated. The Florida state courts have in personam jurisdiction and there is no reason why ownership rights and contract issues cannot properly be adjudicated in that forum.

I would, therefore, dismiss this suit for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

No. 75-1416-Civ-WM

TREASURE SALVORS, INC., a corporation, and Armada Research Corp., a corporation,

Plaintiffs,

vs.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, her tackle, armament, apparel and cargo located within 2500 yards of a point a coordinates 24.31.5' north latitude and 82.50 west longitude, said sailing vessel is believed to be the NUESTRA SENORA de ATOCHA,

Defendant.

O R D E R

MEMORANDUM INCLUDING FINDINGS
OF FACT AND CONCLUSIONS OF LAW

INTRODUCTORY STATEMENT AND CONCLUSIONS OF LAW

This proceeding follows the receipt of the mandate from the United States Court of Appeals in Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, Nuestra Senora de Atocha, etc., 5 Cir., 569 F.2d 330 (C.A. 5th 1978), which affirmed, with certain modifications, the judgment of this Court determining the ownership of salvaged articles from the ship Atocha. In order to effectuate the mandate of the Fifth Circuit, and carry out the judgment of this Court, a warrant for arrest was issued to seize certain salvaged articles

in the possession of the Division of Archives, History and Records Management, Department of State, State of Florida, hereinafter, Division of Archives. The Division of Archives obtained a temporary stay of the warrant from the Fifth Circuit. Subsequently, the Court of Appeals dissolved the stay and allowed execution of the warrant. Pursuant to the warrant of arrest, the property in question was seized and is now in control and possession of this Court.

The Florida Division of Archives has challenged the jurisdiction of this Court and, subject to such objection, claims it is entitled to the property in question for various reasons, principally based upon a purported contract between the Division and Treasure Salvors.

For the reasons that follow, this Court holds: it had jurisdiction to issue the warrant of arrest and seize the property in question; the Division of Archives is bound by the earlier judgment of this Court; Treasure Salvors, under the judgment of this Court, as affirmed by the Fifth Circuit, is the owner of the property and entitled to possession; the claims of the Division of Archives to be the owner of the property, and to be accordingly entitled to the possession of such, are wholly without merit; and the present proceedings are not barred by the Eleventh Amendment to the Constitution of the United States nor by the Doctrine of Sovereign Immunity.

Before proceeding with this memorandum's discussion of the facts and reasons in support of the Court's

conclusions, prepared to satisfy the requirements of Federal Rule of Civil Procedure 52, it may be helpful to place these proceedings in proper perspective, in particular, the role of the agents and employees of the State of Florida, Division of Archives.

The Atocha was lost at sea because of a hurricane in 1622. Spain initially located the wreck and attempted salvage, recovering two cannons. But due to various perils of the sea the wreck was shortly thereafter lost and remained lost for over three centuries.

> [T]hen, in 1971, after an arduous search aided by survivors' accounts of the 1622 wrecks, and an expenditure of more than $2 million, plaintiffs located the Atocha. Plaintiffs have retrieved gold, silver, artifacts, and armament valued at $6 million. Their costs have

included four lives, among them the son and daughter-in-law of Melvin Fisher, plaintiff's president and leader of the expedition. 569 F.2d at 333.

As grave as the perils of sea are and were, the gravest perils to the treasure itself came not from the sea but from two unlikely sources. Agents of two governments, Florida and the United States, who have the highest responsibility to protect rights and property of citizens, claimed the treasure as belonging to the United States and Florida.

The finding of a great treasure from the days of the Spanish Main is not a cherished dream of only the United States and Florida citizens; countless people from other lands have shared such thoughts. It would amaze and surprise

most citizens of this country, when their dream, at the greatest of costs, was realized, that agents of respective governments would, on the most flimsy of grounds, lay claim to the treasure. As previously determined by this Court, the wreck site is outside the territorial boundaries of the United States and Florida, and under provisions of applicable treaties, which are the supreme law of the land, no claim can be made on the basis of sovereign ownership. This Court and the Fifth Circuit rejected a sovereign prerogative argument of the United States that all treasure found by its citizens anywhere in the world belonged to the United States as the American "Crown."

The zeal of the United States in claiming the salvaged articles of the

Atocha has been exceeded by the agents of the State of Florida. Although occasionally state employees are faulted for failure to protect state property, certainly this does not apply to the personnel of the Division of Archives who, in their unstinting efforts to claim property belonging to Treasure Salvors, have reacted as though Treasure Salvors were attempting to steal the old Capitol Building as well as the great Seal of the State.

The ship Atocha's association with Florida is tangential at best and certainly is not integral to the heritage and development of the State. The ship was bound on a voyage from Havana to Cadiz when the storm of 1622 drove it close to, but outside of, the boundaries of the later State of Florida. Its cargo

was not connected or associated with the Florida peninsula. Nevertheless, agents from the Division of Archives have persisted in wrongfully attempting to lay claim to the salvage recovered by Treasure Salvors or an interest therein. The Division of Archives did not find the Atocha or its cargo, and there is no basis in fact for suggesting that the Division ever could have located it, much less recovered it. Merely because agents of the State covet the treasure, does not give the agents the right to take it in the name of the State. It is ironic that the agents of the State are able to use resources of the State to deprive Treasure Salvors of what it justly and rightfully owns, especially when the record reflects that Treasure Salvors was

willing at one time to donate a portion of the salvaged articles to the State.

After presentation of evidence and argument before this Court, both the Division of Archives and Treasure Salvors filed extensive briefs. The Court agrees substantially with the reasons and arguments of Treasure Salvors.

THE DIVISION OF ARCHIVES IS IN PRIVITY AND BOUND BY JUDGMENT OF THIS COURT AS AFFIRMED BY THE FIFTH CIRCUIT

In resolving the jurisdictional issues and the arguments advanced by the Florida Division of Archives, it is significant that the present proceeding is not a new independent action, but concerns an appropriate issuance of an ancillary warrant of arrest in a pending admiralty case over which this Court's

jurisdiction is not questioned and where such ancillary warrant is necessary to carry out the judgment of this Court and the Fifth Circuit. Because of the importance of the nature of this proceeding and the relevancy of certain facts to the jurisdictional issues concerning the Eleventh Amendment and sovereign immunity, the disussion of those issues will be made at the conclusion of this memorandum.

If the Division of Archives is in privity there is no question that it would be bound by the judgment and its argument against jurisdiction would be of no avail. The Fifth Circuit ruled:

> To summarize, the district court properly adjudicated title to all those objects within its territorial jurisdiction and to those objects without its territory as between

> plaintiffs and the United States. In affirming the district court, we do not approve that portion of its order which may be construed as a holding that plaintiffs have exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claimants, if any there be, who are not parties or privies to this litigation. (Emphasis added) 569 F.2d at 335-336.

The crux of the Division of Archives' argument on the jurisdiction of this Court to issue the ancillary warrant of arrest is the assumption that it is not in privity nor bound by the judgment. The Division of Archives contends, in reference to the issuance of the warrant filed in this Court:

> The State of Florida was not at any time a party to this proceeding and had no interest whatsoever therein . . . The State of Florida was not a party on appeal.

In affirming the District Court, this Court expressly ruled:

> We do not approve that portion of its order which may be construed as holding that plaintiffs have exclusive title to, and the right to immediate and sole possession of the vessel and cargo as to other claimants, if any there be, who are not parties or privies to the litigation. Division of Archives' Reply to the Order to Show Cause, P.3.

By the above argument, the Division of Archives fully recognizess that, if it is bound by the judgment, its argument on lack of jurisdiction necessarily fails. The record reflects an involvement by the Division of Archives with the United States, together with a bypassing of an opportunity to intervene, which warrants a holding that the Division is and should be bound.

The Division of Archives did not intervene in the proceeding below, though it had an absolute right to do so. The Division of Archives had a contract with Treasure Salvors regarding the disposition of the treasure and a dispute arose concerning this contract. This dispute as to the terms and rights under the contract arose before Treasure Salvors and the United States went to court to settle the ownership of the treasure. The Division of Archives had notice of the initiation of the suit, and at times thereafter knew of and participated in the litigation of the suit. Being thus involved in the progress of the suit, the Division of Archives was fully aware that this suit was an in rem proceeding brought to

settle, for all the world, the ownership rights to the treasure. Furthermore, the Division of Archives was content to sit back and rely on the federal government to represent and protect its interests, which were now in repudiation of its earlier dealings with Treasure Salvors.

The interest of the Division of Archives was intertwined and interwoven with that of the parties to the extent that Division of Archives had a right to intervene under general principles of admiralty law in reference to the in rem proceedings, and a right, as well, under Rule 24. The conduct of the Division of Archives is important and lends significance to its failure to intervene. Under threats of arrest, the Division of Archives coerced the acceptance of a

salvage contract under which it gave nothing but a site mistakenly claimed as state submerged lands.

The Division of Archives had the right under the purported contract to divide the salvage, giving 75 percent to Treasure Salvors and retaining 25 percent at a time of its choosing. The contract had various forfeiture provisions under which the Division of Archives could claim the entire treasure. Although repeated requests were made to divide the salvage recovered, the Division of Archives refused. This refusal was in bad faith as part of a scheme by the Division to deprive Treasure Salvors of all salvaged treasure. After the Special Master in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375

(1975), determined that Florida boundaries did not in fact encompass the wreck site, and immediately after oral arguments in the Supreme Court, the Division of Archives knew its contract claim was invalid; therefore, it proceeded to immediately divide the treasure and take its purported share.

Based upon the decision of the United States Supreme Court, Treasure Salvors notified the Division of Archives that the salvage contract was nullity. Frustrated in its desire to obtain the entire treasure under the initial contract, the Division of Archives then encouraged the United States to claim the entire treasure. The Division of Archives' plan was to work out an arrangement with the United States over

division of treasure to the total exclusion of Treasure Salvors. To that end it did all it could to assist the United States in the litigation and relied upon the United States to prevail and to protect the interests of the Division of Archives.

After the United States' claim (as urged and supported by the Division of Archives in its dealings) was determined to be without merit by this Court and the Fifth Circuit, the Division of Archives attempted to paint itself as a total stranger to the litigation. It ill behooves the Division of Archives to play such a fast and loose game with courts. For all practical purposes, the Division of Archives was a party in fact, although not technically in name, to the litigation. Under all concepts of

fairness, it should be treated as a party and be bound by the decree--as indeed the cases so hold.

There is no question, given the contract claim regarding rights to the treasure, that the Division of Archives had a right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure. The Division of Archives certainly had "an interest relating to the property or transaction which is the subject of the action" and was "so situated that the disposition of the action may as a practical matter impair or impede [the Division of Archives'] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 24(a)(2) Fed.R.Civ.P. In an analogous case to the instant suit, the Fifth Circuit made it

clear that rule 24(a) was to be interpreted broadly to give it full, practical effect. Atlantis Development Corp. v. United States, 379 F.2d 818 (C.A. 5th 1967). As the Court noted, intervention involves competing interests:

> [O]n the one hand, there is the private suitor's interests in having his own lawsuit subject to no one else's direction or meddling. On the other hand, however, is the great public interest, especially in these explosive days of ever-increasing dockets, of having a disposition at a single time of as much of the controversy to as many of the parties as is fairly possible consistent with due process. Id. at 824.

Considering the Division of Archives' contract, the in rem nature of the proceeding, and the practial reading of the rule on intervention, the Division

of Archives undoubtedly could have intervened had it so desired.

It is important to understand that the Division of Archives was aware that its rights were in jeopardy and purposely chose to rely on the federal government rather than to intervene. The Division of Archives knew of the suit from its initiation and chose to cooperate with the federal government rather than assert its own rights. During the course of the litigation, the Division of Archives engaged in several activities with the federal government. The Division of Archives negotiated with the federal government to obtain an antiquities permit. Had the United States prevailed in the suit, the Division of Archives would have received an antiquities permit from the Department of the Interior for

the wreck site. Furthermore, an attorney for the Florida Secretary of State (the agency which administers the Division of Archives) worked with the federal government on the case, and the Division of Archives engaged in preliminary negotiations regarding disposition of the treasure should the federal government win. The Division of Archives made the purposeful choice to cooperate with the federal government in prosecuting the case, and generally relied on the United States to protect its interest.

With the case decided differently than the Division of Archives desired, it now wishes to assert the interest which it should have protected by intervening in the initial suit. The policies underlying res judicata dictate that the Division of Archives should be bound

by the previous judgment. James & Hazard, in their text on Civil Procedure discuss a variety of circumstances where one not officially a party to an action may nonetheless be bound by a court's decree. In order to give effect to the principles of finality embodied in the doctrine of res judicata, courts may invoke equitable preclusion where a nonparty has been aware of the initial litigation and failed to intervene to protect its interests. James & Hazard, Civil Procedure § 11.31 (1977).

A party who purposely fails to intervene is bound under the law of this Circuit. In Aerojet-General Corp. v. Askew, 511 F.2d 710 (C.A. 5th 1975), the plaintiff sought specific performance of a contract, asserting a right to buy various lands from a state agency. The

Court held for the plaintiff. Subsequently, a Florida government unit (Dade County) came forward to halt conveyance of the land asserting that a state statute gave it absolute prior right to buy the land. The state had not utilized this argument in the original suit, nor had the local agency intervened, although well aware of the litigation. The Court held that the county was bound by the judgment.

In Aerojet, the local government contended that the district court should not have held it bound since it was not a party to the original suit. The Fifth Circuit responded:

> Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with

> his interests as to be his virtual representative. (Citations omitted).
>
> . . . . .
>
> The question whether a party's interests in a case are virtually representative of the interests of a nonparty is one of fact for the trial court. See Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 5 Cir. 1968, 405 F.2d 958, 961. We find no reason to overturn the District Court's determination that Dade County "was in such close relationship to the parties to the first lawsuit before this Court, that its interests or the interests of those which it represents, were represented in that proceeding." D.C., 366 F.Supp. at 910. Aerojet-General Corp. v. Askew, 511 F.2d 710, 719-20 (C.A. 5th 1975)

Because the Division of Archives cooperated with the federal government, relying on it to protect the Division of Archives' interests, it should be bound

by the judgment and not permitted to ask the court to consider matters which could and should have been settled before.

The theory that a nonparty's failure to intervene should result in the decree being conclusive against that nonparty has been suggested in the United States Supreme Court. Justice Harlan in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114, 88 S.Ct. 733, 740, 19 L.Ed.2d 936 (1968), stated that:

> It might be argued that Dutcher should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene.

Furthermore, this concept of equitable preclusion has been applied in admiralty cases. In Cummins Diesel

Michigan, Inc. v. The Falcon, 305 F.2d 721 (C.A. 7th 1962), a nonparty was held bound by a previous judgment where that nonparty had notice and an opportunity to intervene but failed to do so. Cummins involved an action in admiralty where plaintiff filed a libel in rem against a vessel, "The Falcon." Various claimants filed appearances and claimed interests and liens against the vessel. Later, one Holcomb, asserted that the court had no authority to determine the ownership of the vessel. Holcomb, however, had been given actual as well as constructive notice of the previous proceedings. Answering Holcomb's contention that the court had no authority to determine the ownership of the vessel, the court said

> This, however, did not create an issue between appellant and Holcomb, who

had an opportunity to intervene and assert any claim to ownership. This he failed or refused to do and, in our view, the decree is binding upon him the same as on all other parties who were in default. Id. at 723 [Emphasis added].

The United States Supreme Court has held that there may be times when the opportunity to intervene may be enough to bind a person not a party. Moore, 1B Federal Practice ¶0.411 p. 94 (1977, 78 Supp.). In Penn-Central Merger and N. & W. Inclusion Cases, 389 U.S. 486, 88 S.Ct. 602, 19 L.Ed.2d 723 (1968), numerous plaintiffs challenged the finding of the Interstate Commerce Commission in connection with a proposed railroad merger. These actions arose in district courts in several states, and all were continued in deference to the

New York Federal District Court. All plaintiffs were free to join the New York proceedings, but some chose to rely on others to represent their interests. Subsequently, these plaintiffs who had foregone their opportunity to intervene attempted to go forward with their complaints. On the issue of whether these plaintiffs should be bound, the Supreme Court said:

> [They] had an adequate opportunity to join in the litigation in that court following the stay of proceedings in the Middle District of Pennsylvania. As we noted, all district courts in which actions to review the Commission's finding or for injunctive relief were filed continued their proceedings in deference to the New York court. All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily

> follows that the decision of the New York court which, with certain exceptions, we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes. Id. at 505-506, 88 S.Ct. at 612.

The foregoing cases clearly establish the principle that one who has an opportunity to intervene is bound by a judgment affecting his rights where he could have intervened but failed to do so to protect his interests. The facts establish the Division of Archives was fully aware of the preceding suit, consulted with the United States while they prosecuted the case and indeed negotiated with the federal government about securing a portion of the treasure. Since the Division of Archives had the opportunity but failed to intervene, instead relying on the United States to

further its interests, it should now be bound by the judgment rendered previously against the United States.

In addition to being bound because of failing to intervene to protect its interests rather than relying on the United States, the Division of Archives is bound because of its participation in the previous litigation. Professor Moore discusses situations where nonparties may be bound by previous judgments. Moore, 1B Federal Practice ¶0.411[6] p. 1552 (1974):

> If a non-party who thus participates in litigation has an interest sufficiently close to the matter in litigation, and has adequate opportunity to litigate in support of or in defense against the cause of action on which the suit is based, the policies underlying the doctrine of judicial finality require that the par-

> ticipating non-party should be bound by the resulting judgment to the same extent as though he were a party to the action. Id. at 1552.

This policy of binding nonparties who have notice of and participate in the prosecution of previous litigation has been upheld by the United States Supreme Court. Souffront v. Compagnie des Sucreries, 217 U.S. 475, 30 S.Ct. 608, 54 L.Ed. 846 (1910). In Souffront, the Supreme Court said:

> The case is within the principle that one who. . . assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment . . . as he would be if he had been a party to the record. Id. at 487, 30 S.Ct. at 612.

The record shows that the Division of

Archives knew of the suit and consulted with the federal government in the prosecution of the suit. Furthermore, the Division of Archives had an interest at stake in the previous action (an interest very similar to that of the United States) and worked with the United States, counting on the United States as a named party to represent its interest. Testimony shows that the Division of Archives had even preliminarily negotiated division of the artifacts which the United States sought to recover.

The Division of Archives was in privity with the federal government. Privity is a policy concept varying with appropriate circumstances. With regard to the principle of judicial finality Moore suggests that privity is to be found not so much in the fact that a

party is acting as the representative of a nonparty, but rather that the nonparty's participation justifies holding him bound by the judgment. Moore, 1B Federal Practice ¶0.411.[6] p. 1553 (1974). If a nonparty sits on the sidelines monitoring litigation, assisting in the suit, and at all times has the ability to intervene to protect its interest, it would offend the theory of judicial finality not to hold that nonparty bound by the judgment.

In order to be bound, the participating nonparty must have more than a mere academic interest in the outcome of the litigation. Moore outlines three types of interests which have been held sufficient to invoke res judicata effect. See Moore, 1B Federal Practice ¶ 0.411 [6] pp. 1555, 1558, 1559

(1974). While one of these interests would be sufficient, Moore points out that they often overlap, and a case will have characteristics of two or more of these interests. Id. at 1563.

The first type of interest is "[a] legal right, interest or duty dependent wholly or in part on the cause of action before the court for adjudication." Id. at 1555. Under this rule, a grantee who cooperates in a title suit between a third party and his grantor is bound when the grantee acquired his interest before the suit instituted. Souffront v. Compagnie des Sucreries, supra. Similarly, a lessee who participated as a nonparty in defending a condemnation suit was held bound by a judgment of condemnation. Sparks v. Gallagher, 114 Okl. 103, 243 P. 228 (Okla. 1925).

The second kind of interest which justifies binding a participating nonparty is "a proprietary right that will be affected favorably or detrimentally by the outcome of the litigation." Moore, 1B Federal Practice ¶ 0.411[6] p. 1558 (1974). In Hyman v. Regenstein, 258 F.2d 502 (C.A. 5th 1958), Hyman was an inventor and former employee of Regenstein's corporation, Velsicol. While employed at Velsicol, Hyman purportedly signed an agreement to assign all inventions and patents over to Velsicol. Subsequently, Hyman quit Velsicol and started his own corporation utilizing some of the inventions developed at Velsicol. Velsicol sued Julius Hyman & Co., and the Supreme Court of Colorado enjoined further use of the inventions finding the agreement to assign valid.

Julius Hyman & Co. v. Velsicol Corp., 123 Colo. 563, 233 F.2d 977 (1951); cert. denied 342 U.S. 870, 72 S.Ct. 113, 96 L.Ed. 654 (1951). Later Hyman sued Regenstein for damages for loss of profits on the inventions. The United States Court of Appeals for the Fifth Circuit held that the previous suit barred Hyman from contesting the validity of the agreement to assign. That issue had already been decided, and though Hyman had been sued in his corporate rather than individual capacity, he was aware of and involved in the previous litigation, and thus was bound by that judgment.

The idea of binding a participating nonparty is not novel in the Fifth Circuit. Before the Hyman case, Co-op Cab Co. v. Settle, 171 F.2d 40 (C.A. 5th 1948), held a nonparty bound. In Co-op,

the city of Athens, Georgia had denied permits to operate a taxi business to Co-op's competitors. The competitors sought judicial aid in obtaining the permits. The city defended with Co-op assisting as a nonparty. The trial court held that the permits must issue, and the Georgia Supreme Court affirmed. Thereafter, Co-op entered the picture as a party and attempted to enjoin the issuance of the permits. In affirming the district court's decision, the Fifth Circuit adopted the trial judge's language:

> I think the plaintiff, Co-op Cab Company, is bound by the decree in the [previous] proceeding. It is true that it was not a formal party in the case, but it had full knowledge, and an active interest in the litigation. It furnished and paid its own counsel to defend the

> defendant City. The issues here could have been raised in the proceeding.
>
> . . . . . .
>
> It may fairly be said that Co-op, in substance, adopted the State Court litigation for the protection of its contract and franchise, and relied on sustaining the City's refusal to grant Settle a franchise. I think Co-op is bound by the consequences. Id. at 42.

A third type of interest which has been held sufficient to bind a nonparty "exists when the nonparty has some legal right, interest or duty dependent on a question of fact or mixed fact and law that is in issue in the suit." Moore, 1B Federal Practice ¶ 0.411[6], p. 1559 (1974). After describing some cases which take a somewhat narrow view, Moore explains his position:

> But a different, and we are inclined to believe better, view, adopted by the Restatement of Judgments, [See Restatement of Judgments (1942) § 84] is that an interest in the determination of a question of fact or of mixed fact and law, with reference to the same subject matter or transaction, is a sufficient interest to bring a participating nonparty within the scope of the judgment's conclusive force. And the Restatement position receives support from cases in some areas. Id. at 1562. For a list of cases see n.25. Id.

Furthermore, Moore finds that some cases will qualify for the use of res judicata because all three types of interests are involved. Id. at 1563. A common example is a patent infringement suit. Judge Brown explained the concept in the case of Bros., Inc. v. W. E. Grace Mfg. Co., 261 F.2d 428 (C.A. 5th 1958).

The Division of Archives comes under all three of the interests described by Moore. The Division of Archives had a proprietary right that was affected by the litigation's outcome. Also, the Division of Archives' interest depended to an extent on questions of fact or mixed law and fact questions in issue in the previous suit. Having stood on the sidelines and advised the federal government in its prosecution of the case (in fact even admitting that the General Counsel for the Secretary of State worked with the United States in presenting its case), the Division of Archives cannot now be allowed to escape the conclusive effects of that judgment.

In addition to having an appropriate interest in the litigation, a nonparty, to be bound, must have a requisite degree

of participation in the suit. Moore, 1B Federal Practice ¶ 0.411[6] p. 1564 (1974).

> Generally speaking, the rule as to participating non-parties requires that the non-party have control, or at least joint control of the prosecution of defense of the suit . . . The non-party's control, however, need not be absolute: joint control by non-parties, or in conjunction with a party, is sufficient. Id. at 1564, 1566 [citing numerous cases].

Logically, the requirement of control is based on the need to insure that the nonparty truly had his day in court before involving the binding effect of the prior judgment. Where a nonparty participated in the progress of the suit, was at all times aware of the interests being adjudicated, and had the opportunity to intervene, less control

should be necessary to invoke the res judicata effect of the judgment. Though the Division of Archives did not control every aspect of the case, their attorney worked with the federal government; and the state and federal government cooperated in negotiations regarding the disposition of the Atocha, its cargo, etc. The Division purposely relied on the United States to protect its interests in the hope of obtaining a share without having to come into the litigation to assert its own claim. Being content to accept the representation of the federal government, and cooperate with the United States behind the scenes, the Division of Archives should be considered to have participated sufficiently to be bound as a nonparty. As the earlier discussion pointed out, the failure to intervene

should render the Division bound regardless of the amount of participation. The extent of the state's entanglement with and reliance on the federal government in this case simply serves to highlight the fact that equitable principles call for the Division to be bound.

ANCILLARY PROCESS AUTHORIZED TO ARREST SALVAGED ARTICLES PERTAINING TO RES THAT HAD BEEN REMOVED FROM THE SOUTHERN DISTRICT.

In the alternative, even if the Division of Archives were not bound by the prior judgment, this Court had jurisdiction to issue the warrant of arrest and seize the salvaged articles in question.

After receipt of the mandate, ancillary process was issued in reference to certain articles of salvage. The warrant for arrest to obtain the property

in question is authorized by Supplemental Admiralty Rule C(5). The Division of Archives has attempted to block service of the writ. The Court of Appeals for the Fifth Circuit refused to issue a Writ of Prohibition against the service of such writ. The Fifth Circuit in denying the Petition for Reconsideration and Clarification stated:

> The question of the jurisdiction of the District Court for the Southern District of Florida is for that Court to determine in the first instance on the basis of such record as may be developed in that Court.

The Division of Archives had taken the position before the Fifth Circuit that as a matter of law this Court could have no possible jurisdiction to issue the warrant for arrest in question under Admiralty Rules C(3) and the Platoro

Limited, Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (C.A. 5th 1975). Under the facts in this record, jurisdiction to issue warrant for arrest exists. The key fact is that this Court did acquire valid in rem jurisdiction and in personam jurisdiction in reference to the res situated within the Southern District and is merely seeking by ancillary process to recover a portion of salvaged articles that have been removed from the Southern District. In the instant case the warrant for arrest was ancillary in aid of the Court's unquestioned jurisdiction over the res previously arrested and seized within the Southern District. Further, Fed. R. Civ. P. 4(f) provides that all service of process, except subpoenas, by a Federal District Court is co-extensive with the state in which

it is sitting. Under Supplemental Admiralty Rule A, the Rules of Civil Procedure apply except where "inconsistent with these supplemental rules." Division of Archives contends that the warrant for arrest cannot issue to seize property in the Northern District because Supplemental Admiralty Rule E(3) limits the service of process under Admiralty Rule C(3) to the district. There is no such limitation, however, on ancillary process under Rule C(5).

The Division of Archives' interpretation is not warranted under the rules and is not consistent with the Platoro decision nor with the decision of the Fifth Circuit in the present proceedings. Indeed, in Platoro, the Court recognized in rem jurisdiction could be acquired and, thus, the process could be

issued, when the res was accidentally, fraudulently, or improperly removed from the District. 508 F.2d at 1116. The holding in Platoro is applicable only if no portion of the res had been validly arrested within the Southern District of Florida and if no other basis for the exceptions existed. The facts in Platoro differ markedly from the case at bar. Platoro involved the problem of invoking original in rem jurisdiction when no portion of the res was present in the district when the suit was filed. In contrast, the issue before this court centers on ancillary jurisdiction, since original jurisdiction has been established as stated. In Platoro, the plaintiffs had removed the salvage from the district. In the present case, the Division, rather than Treasure Salvors,

removed the articles of salvage from the Southern District. The Court finds this removal was improper and was accomplished pursuant to an invalid contract with Treasure Salvors. The Division then insisted on wrongfully detaining those portions of the res over which this Court had ancillary jurisdiction.

Professor Moore notes:

> Moreover, to the extent a decree in rem may be said to effect all normal incidents of the arrested res, it may be necessary to give extraterritorial effect to ancillary proces to enable the court to bring within its control all property its decree will affect. It would seem that the verdict is not yet in on whether Rule E(3) prevents issuance of ancillary process beyond the geographic boundaries of the district in which a major portion of that res is physically located. 7A Moore's Federal Practice ¶ C.15 p. 700.10.

If the verdict is not in, it is now. The use of ancillary process to protect and perfect an existing in rem jurisdiction over articles removed to another district is proper. A contrary result would produce a multiplicity of lawsuits and conflicting judgments, for it then would be necessary even though one federal district court had in rem jurisdiction, to institute new and separate proceedings in ever district where a portion of the res has been removed -- hardly a desirable goal. Pursuasive, if not controlling, authority for utilization of the ancillary process to obtain in rem jurisdictioin over some articles beyond the Court's boundaries, predicated on existence of a substantial portion of the res within such district, is the Fifth Circuit's opinion in this case.

case. The Fifth Circuit was well aware that although a substantial portion of the vessel's cargo was within the jurisdiction of the district court, it was not possible to physically bring all of the res within the district.

> Initially we note that for all practical purposes it was impossible to bring the entire remains of the vessel and her cargo within the territorial jurisdiction of the court. Thousands of items retrieved from the wreck site were brought into the district, but the bulk of the wreck lies buried under tons of sand in international waters. The district court did everything within its power to have the marshal arrest the vessel and bring it within the custody of the court. Thus, there is little danger that the res, against which any claims might be satisfied, will escape an in rem decree against it. 569 F.2d at 335.

Upholding jurisdiction in the instant case will be fully in accord with the admonition given by the Fifth Circuit:

> These decisions evidence the common concern of the courts with finding the most practical and efficacious means of resolving the disputes before them. An interest in rendering justice rather than an automatistic reliance upon rigid legalisms characterizes each of them. It is with these examples before us that we turn to an examination of the merits of the government's jurisdictional challenge. 569 F.2d at 334.

The validity of ancillary process outside the district is supported by the case of The Joseph Gorham, 13 F. Cas. 1136 (D. Conn. 1843). In Gorham, a ship was arrested in the Southern District of New York. Later, the ship was improperly removed to the District of Connecticut.

The federal court for the Southern District of New York petitioned the federal court for the District of Connecticut to arrest the vessel and return it to New York. The federal court in Connecticut complied with the request, noting that the right to possession properly belonged to the court in New York, and the marshal for that court "[may] have followed [the ship] anywhere and retaken her." Id. at 1140. Similarly, although this court has not petitioned the Northern District to arrest the res in the possession of the Division, the marshal for this district, pursuant to Gorham, could have come to the Northern District and effected the arrest himself.

With regard to process, the case of The Phebe, 19 F. Cas. 426 (D. Maine 1837) is also instructive. The Phebe involved

a challenge to the court's jurisdiction to issue process against the purchaser of a ship at a marshal's sale. The court stated that:

> Process in rem is founded on a right in the thing, jus in re, and the object of the process is to obtain the thing itself . . . It is not, therefore, a valid objection to the issuing of the process asked for, that the person against whom it is asked is neither a party in the cause nor an officer of the court. It is a process that lies against any person who by any means, whether under color of legal process from some other tribunal or without it, has obtained the possession of that which is in the legal custody of the court. Id. at 427.

The Division has obtained the possession of property which is in the legal custody of this Court. The property in question is part of the entire vessel over which this Court has complete juris-

diction, regardless of whether the property was removed from the vessel prior to the vessel's arrest. The George Prescott, 10 F. Cas. 222 (E.D.N.Y. 1865); The Joseph Warner, 32 F. Supp. 532 (D. Mass. 1939). Consequently, the warrant for the arrest of the property in the Northern District is a valid exercise of ancillary process in aid of existing jurisdiction, and, as such, the warrant should be executed.

The language of Rule C(5) governing ancillary process seems perfectly clear and applicable:

> In any action in rem in which process has been served as provided in this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed . . . The court may, on mo-

> tion, order . . . to show cause why it should not be delivered into the custody of the marshall . . .

The provisions of Rule C(5) were followed to the letter. This Court denied the Division of Archives' motion on the show cause.

The upholding of jurisdiction is also fully in accord with the provision of 28 U.S.C. § 1692 regarding property in different districts:

> In proceedings in a district court where a receiver is appointed for property, real, personal or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

In the alternative, even if the Division of Archives were not bound by the pre

vious decree, this Court holds it acquired in rem jurisdiction over the articles of salvage in question through proper issuance of the ancillary warrant of arrest.

DIVISION OF ARCHIVES' CLAIM TO PROPERTY WITHOUT MERIT

The portion of the res seized under the warrant of arrest was comprised of articles of salvage recovered from a wreck site located outside the jurisdiction of the State of Florida and on lands not owned or possessed by the State of Florida. Section 267.061(1)(b), Florida Statutes, which purports to vest title in the State does not apply since the property was not on "sovereignty lands of the State." The Division of Archives has no right nor interest in such property other than what might exist

under an ultra vires contract between the Division and Treasure Salvors. Contrary to the Division of Archives' argument, the Supreme Court in United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375 (1976), did not modify nor change the State of Florida's seaward boundary but merely defined it as it was and is. Nevertheless, the Division persists in arguing that the State's jurisdiction extends beyond the sovereign territorial waters of the United States for purposes of salvage. This Court rejects as specious a claim that the State for purposes of salvage has greater extraterritorial rights than the United States. The argument of Florida also would be in contravention to the Convention on the Outer Continental Shelf. April 29, 1958, 15 U.S.T. 471

(1964) T.I.A.S. No. 5578, 499 U.N.T.S. 31. The report of the International Law Commission written in conjunction with the Convention states:

> It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargos (including bullion) lying on the seabed or covered by the sand of the subsoil. 11 U.S. GAOR, Supp. 9 at 42, U.N. Doc A/3159 (1956).

The territorial rights and limits of the United States were determined by the Fifth Circuit in this case. 569 F.2d 330, supra. The Division of Archives has offered no creditable factual evidence to support its novel theories. This Court finds the wreck site of the Atocha from which the salvage articles in question were recovered was outside of Florida's jurisdiction.

Although the Division of Archives should have intervened earlier, at the stage where the Court acquired in rem jurisdiction over the present articles of salvage, the Division of Archives had the option to decide whether or not it would claim an interest in the property. The Division chose to assert, on the merits, a claim to the property. Under the judgment of this Court, as affirmed by the Fifth Circuit, Treasure Salvors has a valid claim to the property seized, unless the State asserts and establishes a superior claim.

Since the state asserts a claim in this proceeding to the property, it necessarily waives any Eleventh Amendment objections. Clark v. Barnard, 108 U.S. 436, 25 S.Ct. 878, 27 L.Ed. 780 (1883); Gunter v. Atlantic Coast Line Railroad

200 U.S. 273 (1906); Gardner v. State of New Jersey, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1974). See discussion of the Eleventh Amendment and Sovereign Immunity, infra. The Division of Archives obviously cannot ride both horses; it cannot properly assert a claim to ownership of the property and, simultaneously assert immunity under the Eleventh Amendment. These Supreme Court cases hold that when a state voluntarily places itself in the position of a suitor, it is deemed to have laid aside its sovereignty and to have assumed the status of an ordinary suitor so far as concerns any matters properly defensive.

In Langley v. Irons Land and Development Co., 94 Fla. 1010, 114 So. 769, 771-72 (1927), which remains the principal Florida case on invalidation of

contract as a result of mistake, the Florida Supreme Court adopted the following statements from 4 Ruling Case Law 506:

> The jurisdiction of equity to decree the cancellation of an instrument because at the time of its execution the parties, or even one of them, labored under a mistake of fact, is well recognized; and the rule is the same whether the instruments relate to an executory agreement, or one that has been executed . . . [T]he authorities are practically unanimous in holding that the mistake must not result from the want of that degree of care and diligence which would be exercised by persons of reasonable prudence under the same circumstances, or equity will not relieve against it. Moreover, a mistake such as will entitle one to cancellation must be material to the transaction and affect the substance thereof, rather than a mere incident or the inducement for entering into it.

In this regard, the general maritime law, controlling here, is on all fours with that of Florida. See Norris, supra §167; The Alert, 56 F. 721 (S.D.N.Y. 1893); The Clotilde, F.Cas. 2903 (D.C. Me. 1872) (contract declared invalid for mutual mistake). Under maritime law, a misstatement of fact by one of the parties will result in the contract being set aside. The Clandeboye, 70 F. 631 (C.A. 4th 1895).

The coercive acts of the Division of Archives in threatening arrest and confiscation voids the contract under the general maritime law. Crary v. The El Dorado, F.Cas. 3362 (S.D.N.Y. 1856). Contracts entered into because of compulsion, or inequality of bargaining position may be set aside. Norris, supra §§169,170.

Even without the compulsion and coercion of the part of the Division of Archives, in the present case, a mutual mistake of material fact--the location of the wreck site within Florida waters--provided each party's motivation to contract. Had the parties known that, in fact, the property did not lay upon state sovereignty lands there would have been no reason to contract regarding salvage operations. In addition, prior to the litigation to determine the boundary of the State, neither party exercising reasonable diligence could have avoided the mistake of fact. The contract was therefore invalid from the time of its execution, and the fact that it has been partially performed is of no consequence.

In addition to mutual mistake of material fact, the contract between the

Division of Archives and Treasure Salvors is invalid for lack or failure of consideration. See Marks v. Fields, 160 Fla. 789, 36 So. 2d 612 (1948); Jones v. McCallum, 21 Fla. 392 (1885). The contract between the parties dated December 3, 1974, included in Exhibit 1, recites that the State of Florida owns the land on which the wreck is located (page 1 of contract) and further recites that the State owns the wreck and all materials found therein (page 2 of contract). In consideration of Treasure Salvors' payment of $1,200.00 and covenants to salvage the sunken property, the Division of Archives conveyed to Treasure Salvors the salvage right to the property. The Division of Archives agreed to convey, at the completion of the salvage operation, 75 percent of the material salvaged.

There was at the very least a failure of consideration on the part of the Division under the statute on which the Division relies. Section 267.061(1)(b), Florida Statutes, provides:

> It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the Division of Archives, History, and Records Management of the Department of State for the purpose of administration and protection. [Emphasis added].

Section 267.031(5), Florida Statutes, authorizes the Division of Archives to enter into contracts which are "necessary, expedient, or incidental to the performance of its duties or the

execution of its powers under this chapter."

Since the property was never actually located on Florida sovereignty submerged lands, the property did not belong to the State and, as a result, the Division lacked all authority to enter into a contract conveying salvage rights. Additionally, since the property was not owned by the State, because not located on sovereignty submerged lands, the Division was without authority to promise, as consideration for the contract, 75 percent of the property recovered. An early Florida case which is still applicable adequately expresses the controlling legal maxim:

> The law aptly terms an agreement to do an act or to pay money . . . where there is no consideration for it a nudum pactum . . .

> a promise without legal support, which the law will not enforce . . . Jones v. McCallum, 21 Fla. 392, 395 (1885).

The contract at issue here must be deemed invalid. Aside from the coercion shown, the contract was entered into on the basis of mutual mistake of a material fact and suffers from a complete lack or failure of consideration.

Rescission of the contract is a maritime remedy and courts have discretion in its application. Before rescission may be granted, it must appear that the parties can be restored to the positions they held prior to formation of the contract. If restoration of the status quo is not possible, rescission should not be granted. See McDonald v. Sanders, 103 Fla. 93, 137 So. 122, 126 (1931); Glass v. Craig, 83 Fla. 408, 36

(1922). But the fact that a contract is partially executed will not operate as a bar to rescission of the contract if rescission is otherwise warranted. Langley v. Irons Land and Development Co., 94 Fla. 1010, 114 So. 769, 771 (Fla. 1927).

Under facts of the present case the prties can easily be restored to their prior positions by distribution of the property in the possession of this Court to Treasure Salvors.

The right to rescission has not been waived by Treasure Salvors. In Rood Co. v. Board of Public Instruction, 102 So.2d 139 (Fla. 1958), the plaintiff was seeking rescission, on the basis of mistake, of a contract for sale of land and a deed executed pursuant to the contract. The court stated that the right to rescission

may be waived if, after acquiring knowledge of the mistake, the party seeking rescission either "remains silent when he should speak or in any manner recognizes the contract as binding upon him, ratifies or accepts the benefits thereof . . ." Id. at 142. Treasure Salvors did not remain silent after learning of the mistake, nor did it thereafter recognize the contract as binding upon either party. Instead, it notified the Division of Archives of the Supreme Court decision, suggested that the contract was null and void, removed the state agent from its vessel and, on July 19, 1975, formally declared the contract null and void.

Further, the maritime courts require of all parties to a maritime contract the utmost good faith before they can assert rights under the contract. Coercion and

compulsion are evidence of bad faith. The acts of the State, contrary to the interests of Treasure Salvors, who it now claims was their agent, are egregious acts of bad faith amounting to collusion to defeat the claims of a person standing in a fiduciary relationship to the State. See Norris, Law of Salvage, Ch. VIII, Misconduct of Salvors (1958). The maritime law allows the forfeiture of all salvage claims for acts of extreme bad faith of the nature outlined above. The action of the Division, in seeking to obtain an interest from the United States, constituted a repudiation by the Division of its contract with Treasure Salvors. In occupying a mutually inconsistent position in its dealings with the United States and with Treasure Salvors, the Division did not act in good

faith towards Treasure Salvors' rights. The Division performed no salvage service of value.

Additionally, the contract is invalid because the states cannot constitutionally alter general admiralty and maritime jurisdiction and congressional acts thereunder. The Fifth Circuit in its decision in this case stated:

> . . . although at least one state court has invoked English Common Law to award ownership of a sunken vessel to the sovereign, the "American Rule" vesting title in the finder has been widely recognized by courts and writers. (Citations omitted). We accept the "American Rule" as it has been uniformly pronounced in the courts of this nation for over a century. Treasure Salvors v. Unidentified Wrecked, etc., 569 F.2d 330, 343 (1978).

By this pronouncement, the Fifth Circuit puts into perspective the State's claim

to wrecked and abandoned vessels such as the one in the case at bar.

Norris observes:

> It is the policy of the general maritime law to encourage the salvaging of derelict marine property on, and in, navigable waters. The presumption by a state of title of possession to abandoned marine property on navigable waters raises the serious constitutional question of the interference by a state of what is essentially a federal problem. Norris, Law of Salvage, Section 157, p. 137 (1974 Cummulative Supplement).

We are concerned with substantive maritime law that has been the subject of innumerable federal statues, rules and regulations. The power of Congress to enact substantive maritime law was initially considered conferred by the Commerce Clause, e.g., The Daniel Ball,10 Wall. (77 U.S.) 557, 564 (1871); The

Robert W. Parsons, 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed. 73 (1903). Later opinions firmly establish that the source of the Congress's power was the Admiralty grant itself, as supplemented by the Necessary and Proper Clause, as Justice Bradley said in Butler v. Boston and S.S.S. Co., 130 U.S. 527 9 S.Ct. 612, 619, 32 L.Ed. 1017(1889):

> [A]s the Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction and as this jurisdiction," is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures. (Emphasis added).

Accord: In re Garnett, 141 U.S. 1, 11 S.Ct. 840, 35 L.Ed. 631 (1891).

The insistence of the State that a finder of a wrecked and abandoned vessel not only does not get title but that it has the right or authority to prohibit salvage or, if granted, to regulate salvage is in direct conflict with substantive maritime law. Chapter 267, Florida Statutes, cannot be used to alter or prejudice the rights of a finder or salvager under applicable maritime law. For the State to insist that Chapter 267, Florida Statutes, governs the rights of a finder or salvager would lead to unconstitutionality of acts taken in such reliance.

This Court finds that Ch. 267.061, Florida Statutes, is not applicable to the articles of salvage in question. Because of the Division of Archives' insistence that the statute does control, the Court further finds that under the

provision of that chapter, the Division still would not be entitled to prevail in this action for the several reasons previously stated. In the alternative, Ch. 267.061, Florida Statutes, is unconstitutional based upon the holding in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974), noted with apparent approval of the Fifth Circuit in this case. 569 F.2d at 340. The Diaz case held the federal statute 16 U.S.C. §433 concerning objects of antiquity situated on land owned and controlled by the Government of the United States to be unconstitutionally vague:

> Nowhere here do we find any definition of such terms as "ruin" or "monument" (whether historic or prehistoric) or "object of antiquity." The statute does not limit itself to Indian reservations or to Indian relics. Hobbyists

> who explore the desert and its ghost towns for arrowheads and antique bottles could arguably find themselves within the Act's proscriptions. 499 F.2d at 114.
>
> . . .
>
> In our judgment the statute, by use of undefined terms of uncommon usage, is fatally vague in violation of the due process clause of the Constitution. 499 F.2d at 115.

The court relied upon Connally v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926), and Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

The Florida staute claims ownership of such items as artifacts, objects of antiquity, monuments, memorials, treasure trove, shipwrecks, etc., and is substantially identical to the Federal Act. In

only one instance does the Florida Act attempt definition, and this definition is confusing. Treasure trove is defined as "gold, silver bullion, jewelry, pottery, ceramics, antique tools and fittings, ancient weapons, etc." The meaning of treasure trove at common law would not include articles of salvage.

> Treasure trove is a name given by the early common law to any gold or silver, plate or bullion, found concealed in the earth or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown. Livermore v. White. 74 Me 452, 456 (1883), Sovern v. Yoran, 16 Ore. 269, 20 P. 100, 8 Am.St. Rept. 293 (1888) (Emphasis added.)
>
> . . . [I]t is essential to the character of treasure trove that it shall have been concealed by the owner for safekeeping. 1 Am.Jur. 2d p. 6, Perry, Sovereign

Rights in Sunken Treasure, Land and Natural Resources Division Journal, U.S. Dept. of Justice, Vol. 7, No. 3, p. 89, 1969. (Emphasis added).

The extent of control over which the Division of Archives claims in reference to maritime salvage operations also raises a serious question of interference with the jurisdiction of the federal courts in admiralty and maritime matters.

No legislation is valid if it contravenes an essential purpose expressed by Act of Congress or works material prejudice to characteristic features of general maritime law, or interferes with proper harmony and uniformity of that law in its international and interstate relations. Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), Clyde S.S. Co. v. Walker, 244

U.S. 255, 37 S.Ct. 545, 61 L.Ed. 116 (1917). No state has power to abolish the well recognized maritime rule concerning measure or recovery and substitute, therefore the full indemnity rule of the common law. See Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1918). The entire subject of maritime law including its substantive as well as its procedural features is under federal control. "The Congress thus has the paramount power to determine the maritime law which shall prevail throughout the contry." Detroit Trust Co. v. Barlum S.S. Co., 293 U.S. 21, 43, 55 S.Ct. 31, 38, 79 L.Ed. 176 (1934).

There can be no doubt that the attempt by the Division of Archives, under

the extremely vague terms of Chapter 267, Florida Statutes, to alter general maritime law is a new and unprecedented concept. Chapter 267 and its administrative interpretation in Chapter 1A-0.01 through 1A-31, Florida Administrative Code, seeks to completely govern search, salvage and the ultimate division of recovered items. Section 1A-31.09, Florida Administrative Code, goes so far as to claim all items recovered and then leaving to the Division of Archives the complete control of any division with the finder/salvor. The application of Chapter 267, Florida Statutes, to wrecked and abandoned vessels is beyond the state's power as it is maritime in nature.

By Section 9, Judiciary Act of 1789, 1 Stat. 76, 77, the District Courts of the United States were given "exclusive, original cognizance of all civil cases of admiralty and maritime jurisdiction; . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it" and this grant has been continued. 28 U.S.C. §1333. There can be no doubt that Congress has acted to regulate salvage. The Salvage Act of 1912, 37 Stat. 242 (1912), 46 U.S.C. 727-31.

The claim of the Division to the salvage articles based on the purported contract with Treasure Salvors is without merit. The claim of the Division for a salvage award is denied by the reasons previously set forth.

NEITHER ELEVENTH AMENDMENT NOR SOVEREIGN IMMUNITY BAR PRESENT PROCEEDINGS

The Division of Archives has urged in this Court and in the Fifth Circuit, on its application for stay and prohibition, that the present proceeding is precluded by the Eleventh Amendment to the Federal Constitution. Although the amendment when applicable can certainly bar an action against the State, the amendment is not violated under the structure of the present proceedings. As noted previously, the Division of Archives had the choice to claim an interest in the res in this proceeding. Since the Division of Archives chose to assert such a claim on the merits, it necessarily waived the Eleventh Amendment as to its claim. The situation is directly analogous to a state filing a claim to a

res under the jurisdiction of the Federal Bankruptcy Court. Gardner v. State of New Jersey, 329 U.S. 565, 573-74, 67 S.Ct. 467, 472, 91 L.Ed. 504 (1947):

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. Wiswall v. Campbell, 93 U.S. 347, 351, 23 L.Ed. 923 (1826). If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is nonetheless such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or

satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim. See Clark v. Barnard, 108 U.S. 436, 447, 2 S.Ct. 878, 882, 883, 27 L.Ed. 780 (1883); Gunten v. Atlantic Coast Line R. Co., 200 U.S. 273, 284-289, 26 S.Ct. 252, 256-258, 50 L.Ed. 447; Missouri v. Fiske, 290 U.S. 18, 24, 25, 54 S.Ct. 18, 20, 78 L.Ed. 145 (1933).

The admiralty proceedings before the Court following the supplemental process can be resolved on the basis of presentation and determination of the validity of the Division of Archives' claim. Other than determining that the Division of Archives' claim to the property is without merit, it is not necessary for this Court to adjudicate a claim by any of the parties against the State of

Florida. Accordingly, any separate claims against the Division of Archives are dismissed without prejudice.

In this case, the Court on April 6, 1978, after receipt of mandate, issued the ancillary warrant of arrest to aid and carry out the judgment of this Court as affirmed by the Fifth Circuit. The Motion for the warrant correctly stated that "the State of Florida and said L. Ross Morrell and James McBeth were privy to this litigation," and asserted facts reflecting that the warrant was in reference to this Court's existing jurisdiction as affirmed by the Fifth Circuit. The State of Florida obtained an emergency stay of the warrant from a circuit judge of the Fifth Circuit on April 12, 1978. It is significant to note that the warrant was <u>not</u> issued in response to

Treasure Salvors' Supplemental Complaint for Declaratory Judgment and Other Relief which was filed April 17, 1978.

In both this Court and the Fifth Circuit, the Division of Archives relies on In re State of New York, 256 U.S. 490, 40 S.Ct. 588, 65 L.Ed. 1057 (1921), which upheld the immunity of a state to an in personam suit in Admiralty under the Eleventh Amendment. The present proceedings, however, are in rem as the result of the issuance of ancillary warrant of arrest and are governed by holdings In re State of New York (the Queen City), 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921), and In re Muir, 254 U.S. 522, 41 S.Ct. 185, 65 L.Ed. 383 (1921).

The Queen City case was a libel in rem, "to recover damages alleged to have been sustained through the death of

deceased by drowning due to the negligent operation of the Queen City . . . . " 256 U.S. at 508, 41 S.Ct. at 592. The Supreme Court after accepting as a jurisdictional fact that the Queen City was the "property of the State of New York" ruled that the State was exempt from the in rem proceeding against the vessel because it was "public property of a state used and employed for public and governmental purposes." 256 U.S. at 511, 41 S.Ct. at 593. The Court ruled that since the state's ownership of the vessel had been duly accepted in the proceedings below, the ownership now could not be contested. It is significant that the issue of ownership was treated as a jurisdictional fact for the Court to first determine as a prerequisite in determining the exemption. The Supreme

Court distinguished In re Muir where the Court had refused to issue a Writ of Prohibition against an in rem proceeding because the ownership of the vessel (British Government) was not clear under the record. The Supreme Court noted:

> [I]t is apparent that the status of the Gleneden, [the ship which may have been in British service] . . . is at best doubtful and uncertain, both as matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, for it turns on the status of the vessel. the suit is still in the interlocutory stage. The court may take up again the question of its jurisdiction. If it does, the inquiry may proceed on other lines and the facts may be brought out more fully than before. 254 U.S. at 533.

The Fifth Circuit in this case denied the Writ of Prohibition noting that the question of jurisdiction was

first to be developed in this Court. As a jurisdictional fact this Court finds the Division of Archives is not and never was the owner of the ship Atocha, her tackle, apparel, cargo, etc. This Court finds as fact that the Division of Archives is not and never was the rightful owner of the articles of salvage from the ship Atocha that were seized by the ancillary warrant of arrest and which have been improperly removed and held by the Division of Arhcives; that the Division of Archives is not the owner of any right or interest in such property based upon the purported and invalid contract with Treasure Salvors; and that the Division of Archives was wrongfully withholding a portion of the res of the Atocha over which this Court was properly exercising in rem jurisdiction.

There is no Eleventh Amendment bar to the mere arrest of articles of salvage unless the state is the owner. If the state is not the owner, the court may proceed. It is axiomatic that the federal courts have jurisdiction to determine jurisdiction; e.g., United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947). This would of necessity require judicial determination of a state's immunity from jurisdiction. As reflected by the Supreme Court cases involving the Eleventh Amendment, the determination of the immunity question is a jurisdictional matter within the province of the courts; it is not both a self-proclaimed and self-determined ukase of the state.

The present admiralty proceeding thus involves a portion of the salvaged articles pertaining to a res that previously was properly brought before the jurisdiction of this Court. The Division of Archives' argument in reality is predicated upon a different situation: in essence the state argues that Treasure Salvors could not institute an independent action against the Division of Archives seeking a judgment for the value of the articles wrongfully taken by the Division of Archives. Perhaps the short answer to the Division of Archives' contention is that, even if this hypothetical situation were the case, under a controlling precedent of the Florida Supreme Court, sovereign immunity would not necessarily bar such action. As Justice Terrell ruled for the Florida Supreme

Court in State Road Department of Florida v. Tharp, 146 Fla. 745, 1 So. 2d 868 (1949):

> Immunity of the State from suit does not afford relief against an unconstitutional statute or against a duty imposed on a state officer by statute, nor does it afford a state officer relief for trespassing on the rights of an individual even if he assumes to act under legal authority. It will not relieve the State against any illegal act for depriving a citizen of his property; neither will it be permitted as a plea to defeat the recovery of land or other property wrongfully taken by the State through its officers and held in the name of the State. It will not be permitted as a City of refuge for a State agency which appropriates private property before the value has been fixed and paid. 1 So. 2d at 869.

The Eleventh Amendment is a shield to protect the fiscal integrity of the State. It is not a sword whereby agents of the State can take and appropriate the property and lives of its citizens without due process. The public policy of Florida, as held by the State's highest Court, does not tolerate misguided State employees trampling upon the basic constitutional rights of its citizens and then covering up such wrong-doings under a guise of sovereign immunity. Although the State must act through its agents, the wrongful activities of the employees of the Division of Archives are not immune. The Court finds that the agents for the Division of Archives wrongfully, and in violation of basic due process rights under Federal and Florida law, deprived Treasure Salvors of its property.

Although unnecessary to the resolution of the application of the Eleventh Amendment to the present suit, there are additional and alternative reasons that would restrict the broad and general application of the Eleventh Amendment to admiralty proceedings as urged by the Division of Archives. The Division of Archives has the power to contract and, as testified by the Deputy Secretary of State, has the power to sue and be sued. If the Deputy Secretary of State is correct, this would arguably constitute a waiver of immunity to contract actions.

The State Constitution authorizes the legislature to waive sovereign immunity. Fla. Const. art 10 § 13. The legislature has waived immunity and specifically authorized suits to quiet

title where the state claims an interst or lien and the plaintiff seeks to execute or foreclose a lien. Section 69.041, Florida Statutes. A suit to quiet title and to establish and foreclose a salvage lien is such a suit. Since the Division of Archives has no title to the property in suit, its claim at most, is a lien arising under the contract. The Division of Archives then claims, under the contract of salvage, that it is entitled to the articles of salvage, since the contract was partially executed. But a contract does not vest title in and of itself. Under maritime law the most that a contract for salvage vests in the parties to a salvage contract is a maritime lien.

Further, the legislature has authorized suits to establish claims to

abandoned property. Chapters 716 and 717, Florida Statutes. Sections 716.07 and 717.22 specifically authorize suits to establish claims to abandoned property. This authorization is not limited to the state courts, but even if it were, such a limitation would be void and an intrusion by the State into an exclusive Federal domain, i.e., admiralty, where the claim is based upon the general maritime law.

The Division of Archives claims title under Section 267.061, Florida Statutes, purporting to vest title in the Department of Archives. This section is inapplicable because this Court and the Fifth Circuit already established that the property in question was found outside the territorial boundaries of the State and not on State sovereign lands.

See Treasure Salvors v. Unidentified Wrecked, etc., 569 F.2d 330, 333 (C.A.5th 1978) Hence, any claims the State has must of necessity fall under Chapter 716 or 717, Florida Statutes.

The State could not create a state court remedy that would apply to the pure admiralty right to award salvage service:

> The admiralty courts have exclusive jurisdiction in cases of salvage . . . based on the elements of a salvage service . . . common law courts can assess damages based upon contract, but cannot make a salvage award in the nature of a bounty for meritorious service rendered and to encourage others to do likewise. Norris, The Law of Salvage §14 (1958).

Hence, the administrative claim provisions of Chapters 716 and 717 are inoperative in this purely maritime case and this Court has jurisdiction to proceed to

adjudicate title to the property now in the hands of the substitute custodian though the effect will be to adjudicate the claim the Division of Archives has made to the property. This Court finds the Division of Archives has no title, the inchoate lien under the salvage contract is abrogated, and Treasure Salvors' title, as originally adjudicated, is confirmed.

In addition, this is not a suit to recover a money judgment from the State prohibited by Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) and Ford Motor Company v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945). Instead, Treasure Salvors here seeks to recover a portion of the property they own by virtue of discovery and possession on the Outer

Continental Shelf. If the Division of Archives were allowed to retain this property, its officials would be acting outside the scope of their authority under state law since the state statutes under which they claim do not apply outside the State's territory. The rationale of Home Tel. & Tel. v. Los Angeles, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913), prohibits this result since to allow such action would be to deprive Treasure Salvors of their property without due process in violation of the Fourteenth Amendment to the Constitution of the United States.

The State of Florida by engaging in a salvage operation outside of state boundaries, and outside the boundaries of the United States of America, in an exclusive area of maritime jurisdiction,

submitted any claims that it might have to the jurisdiction of this admiralty court, a court of exclusive jurisdiction in in rem admiralty proceedings. This action constituted a further waiver of sovereign immunity within the holding of Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). While Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), may seem to limit Parden, the rationale of those cases does not apply here. First, as previously noted, this is not a suit to recover a money judgment from the state but rather an ancillary action by Treasure Salvors to bring within the jurisdiction of the court property

adjudicated to be its property as against the United States and others in privity with it. Second, the limit mentioned in Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), does not apply here because there is no need for the "threshhold fact of congressional authorization" to allow the plaintiff in this action to bring a suit in reference to a state's maritime activity in international waters. The Constitution of the United States, Art. 3, Sec. 2, has been interpreted to include a grant to the courts to declare the general maritime law and to supplement it -- a true legislative role. Hence, there is judicial authorization of a legislative nature giving express authorization to Treasure Salvors and others similarly situated to assert a

maritime claim just as explicit as the legislative grant in Parden.

For these reasons, and principally in reference to the discussion of Gardner v. State of New Jersey, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947); In re State of New York (Queen City), 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921); In re Muir, 254 U.S. 522, 41 S.Ct. 185, 65 L.Ed. 383 (1921); and State Road Department of Florida v. Tharp, 145 Fla. 745, 1 So. 2d 868 (1949), this Court holds that neither the Eleventh Amendment nor sovereign immunity deprive this Court of jurisdiction in its present proceedings.

DONE and ORDERED at Miami, Florida, this 21st day of August, 1978.

s/William O. Mehrtens
Senior United States
District Judge

ARTICLE III

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more States; between a State and citizens of another State;-- between citizens of different States;-- between citizens of the same State claiming lands under grants of different States, and between a

State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

CHAPTER 267
ARCHIVES, HISTORY, AND RECORDS MANAGEMENT

267.011 Short Title.

267.021 Definitions.

267.031 Division of Archives, History, and Records Management.

267.041 Office of the director.

267.051 Bureau of Archives and Records Management.

267.061 Bureau of Historic Sites and Properties; state policy, responsibilities.

267.0615 Historic Preservation Project Review Council; creation; members; membership; powers and duties.

267.0616 Submission of proposals for state historical preservation boards of

trustees required; procedure.

267.0617 Historic Preservation Trust Fund.

267.062 Naming of state buildings and other facilities.

267.071 Bureau of Historical Museums.

267.081 Bureau of Publications.

267.09 Certain powers and duties transferred.

267.10 Legislative intent.

267.11 Designating archaeological sites.

267.12 Research permits; procedure.

267.13 Prohibited practices; penalties.

267.14 Legislative intent.

267.011 Short title. --This act shall be known as the "Florida Archives and History Act."

History. --s. 1, ch.67-50.

267.021 Definitions. --For the purpose of this act:

(1) "Division" shall mean the Division of Archives, History, and Records Management of the Department of State.

(2) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of officiasl business by any agency.

(3) "Agency" shall mean any state, county, or municipal officer, department, division, board, bureau, commission, or other separate unit of government

created or established by law.

(4) "Florida State Archives" shall mean an establishment maintained by the division for the preservation of those public records and other papers that have been determined by the division to have sufficient historical or other value to warrant their continued preservation by the state and have been accepted by the division for deposit in its custody.

(5) "Records center" shall mean an establishment maintained by the division primarily for the storage, processing, servicing, and security of public records that must be retained for varying periods of time but need not be retained in an agency's office equipment or space.

(6) "Historic sites and properties" shall mean real or personal property of historical value.

History. --s. 2, ch. 67-50; ss. 10, 35, ch. 69-106; s. 72, ch. 71-377.

267.031 Division of Archives, History, and Records Management. --

(1) The Division of Achives, History, and Records Management shall be organized into as many bureaus as deemed necessary by the division for the proper discharge of its duties and responsibilities under this chapter; provided, however, that in addition to the office of the director, there shall be at least four bureaus to be named as follows:

(a) Archives and records management.

(b) Historic sites and properties.

(c) Historical museums.

(d) Publications.

(2)(a) The Secretary of State is

hereby authorized to appoint advisory councils to provide professional and technical assistance to the division. The councils shall consist of not less than five nor more than nine members, and such appointments shall consist of persons who are qualified by training and experience and possessed of proven interest in the specific area of responsibility and endeavor involved.

(b) The chairman of each of said councils shall be elected by a majority of the members of the council and shall serve for 2 years. If a vacancy occurs in the office of chairman before the expiration of his term, a chairman shall be elected by a majority of the members of the council to serve the unexpired term of such vacated office.

(c) It shall be the duty of any of

the advisory councils appointed hereunder to provide professional and technical assistance to the division as to all matters pertaining to the duties and responsibilities of the division in the administration of the provisions of this chapter. Members of the councils shall serve without pay, but shall be entitled to reimbursement for their necessary travel expenses incurred in carrying out their official duties, as provided by s. 112.061.

(3) The division may employ a director of the division and shall establish his qualifications. The director shall act as the agent of the division in coordinating, directing, and administering the activities and responsibilities of the division. The director may also serve as the chief of

any of the bureaus herein created. The division may employ other employees as deemed necessary for the performance of its duties under this chapter.

(4) The division shall adopt such rules and regulations deemed necessary to carry out its duties and responsibilities under this chapter, which rules shall be binding on all agencies and persons affected thereby. The willful violation of any of the rules and regulations adopted by the division shall constitute a misdemeanor.

(5) The division may make and enter into all contracts and agreements with other agencies, organizations, associations, corporations and individuals, or federal agencies as it may determine are necessary, expedient, or incidental to the performanmce of its

duties or the execution of its powers under this chapter.

(6) The division may accept gifts, grants, bequests, loans and endowments for purposes not inconsistent with its responsibilities under this chapter.,

(7) All law enforcement agencies and offices are hereby authorized and directed to assist the division in carrying out its duties under this chapter.

History. --s.3, ch. 67-50; ss. 10, 25, 27, 35, ch. 69-106; s. 73, ch. 71-377; s.1, ch. 73-280; s. 4, ch. 78-323.

267.041 Office of the director. --

(1) It shall be the duty and responsibility of the office of the director to render all services required by the division and the several bureaus

herein set forth that can advantageously and effectively be centralized. The office shall perform such other functions and duties as the division may direct.

(2) The director shall supervise, direct, and coordinate the activities of the division and its bureaus.

History. --s.4, ch.67-50; ss. 10, 35, ch. 69-106.

267.051 Bureau of Archives and Records Management. --

(1) It shall be the duty and responsibility of the Bureau of Archives and Records Management to:

(a) Administer on behalf of the division the provisions of this section.

(b) Organize and administer the Florida State Archives.

(c) Preserve and administer such records as shall be transferred to its

custody, and to accept, arrange, and preserve them, according to approved archival practices and to permit them at reasonable times and under the supervision of the division to be inspected, examined and copied; provided that any record placed in the keeping of the division under special terms or conditions restricting their use shall be made accessible only in accordance with such terms and conditions.

(d) Cooperate with an assist insofar as practicable state institutions, departments, agencies, the counties, municipalities and individuals engaged in activities in the field of state archives, manuscripts, and history, and to accept from any person any papers, books, records and similar materials which in the judgment of the division

warrant preservation in the state archives.

(e) Provide a public research room where, under policies established by the division, the materials in the state archives may be studied.

(f) Conduct, promote, and encourage research in Florida history, government, and culture, and to maintain a program of information, assistance, coordination, and guidance for public officials, educational institutions, libraries, the scholarly community, and the general public engaged in such research.

(g) Cooperate with and, insofar as practicable, assist agencies, libraries, institutions, and individuals in projects designed to preserve original source materials relating to Florida history, government, and culture, and to prepare

and publish, in cooperation with the Bureau of Publications, handbooks, guides, indexes, and other literature directed toward encouraging the preservation and use of the state's documentary resources.

(h) Establish and administer a records management program, including the operation of a record center or centers directed to the application of efficient and economical management methods relating to the creation, utilization, maintenance, retention, preservation and disposal of records.

(i) Analyze, develop, establish, and coordinate standards, procedures and techniques of record-making and record-keeping.

(j) Insure the maintenance and security of records which are deemed

appropriate for preservation.

(k) Establish safeguards against unauthorized or unlawful removal or loss of records.

(l) Initiate appropriate action to recover records removed unlawfully or without authorization.

(m) Institute and maintain a training and information program in all phases of archives and records management to bring to the attention of all agencies approved and current practices, methods, procedures and devices for the efficient and economical management of records.

(n) Provide a centralized program of microfilming for the benefit of all agencies.

(o) Make continuous surveys of record-keeping operations.

(p) Recommend improvements in

current record management practices, including the use of space, equipment, supplies and personnel in creating, maintaining and servicing records.

(q) Establish and maintain a program in cooperation with each agency for the selection and preservation of records considered essential to the operation of government and to the protection of the rights and privileges of citizens.

(r) Make, or to have made, preservation duplicates, or designate existing copies as preservation duplicates, to be preserved in the place and manner of safekeeping as prescribed by the division.

(2) Any agency is hereby authorized and empowered to turn over to the division any record no longer in current

official use and the division, in its discretion, is authorized to accept such records and having done so shall provide for their administration and preservation as herein provided and upon acceptance shall be considered the legal custodian of such records.

(3)(a) All records transferred to the division may be held by it in a records center, to be designated by it, for such time as in its judgment retention therein is deemed necessary. At such time as it be established by the division, said records as are determined by it as having historical or other value warranting continued preservation shall be transferred to the Florida State Archives.

(b) Title to any record detained in any record center shall remain in the

agency transferring such record to the division.

(c) Title to any record transferred to the state archives, as authorized in this chapter, shall be vested in the division.

(4) The division may make certified copies under seal of any records transferred to it upon the application to any person, and said certificates, signed by the director, shall have the same force and effect as if made by the agency from which the records were received. The division may charge a reasonable fee for this service.

(5) Any preservation duplicate of any record made pursuant to this chapter shall have the same force and effect for all purposes as the original record. A transcript, exemplification, or certified

copy of such preservation duplicate shall be deemed, for all purposes, to be a transcript, exemplification or certified copy of the original record.

(6) It shall be the duty of each agency to:

(a) Cooperate with the division in complying with the provisions of this chapter.

(b) Establish and maintain an active and continuing program for the economical and efficient management of records.

(7) Each agency shall submit to the division in accordance with the rules and regulations of the division a list or schedule of records in its custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal or

fiscal significance to warrant further retention by the agency. Such records shall, in the discretion of the division, be trasnsferred to it for further retention and preservation, as herein provided, or may be destroyed upon its approval.

(8) No records shall be destroyed or disposed of by any agency unless approval of the division is first obtained. The division shall adopt reasonable rules and regulations not inconsistent with this chapter which shall be binding on all agencies relating to the destruction and disposal of records. Such rules and regulations shall provide but not be limited to:

(a) Procedures for complying and submitting to the division lists and

schedules of records proposed for disposal.

(b) Procedures for the physical destruction or other disposal of records.

(c) Standards for the reproduction of records for security or with a view to the disposal of the original record.

(9) The division may employ a chief of the Bureau of Archives and Records Management. The chief shall possess such qualifications as the division may prescribe but shall be qualified by experience and training to administer the functions of the bureau and he shall serve at the pleasure of the division. It shall be the duty of the chief, under the general administration of the director, to supervise, direct, and coordinate the activities of the Bureau of Archives and Records Management.

History. --s. 5, ch. 67-50; ss. 10, 35, ch. 69-106.

267.061 Bureau of Historic Sites and Properties; state policy, responsibilities. --

(1) State policy relative to historic sites and properties:

(a) It is hereby declared to be the public policy of the state to protect and preserve historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, historical sites and properties and buildings or objects, or any part thereof relating to

the history, government and culture of the state.

(b) It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the Division of Archives, History, and Records Management of the Department of State for the purpose of administration and protection.

(2) It shall be the responsibility of the Bureau of Historic Sites and Properties to:

(a) Locate, acquire, protect, preserve, and promote the location, acquisition, and preservation of historic sites

and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof.

(b) Develop a comprehensive statewide historic preservation plan.

(c) Encourage and promote the acquisition, preservation, restoration and operation of historic sites and properties by other agencies so that such property may be utilized to foster and promote appreciation of Florida history; provided, however, that no acquisition, preservation, restoration, or operation of such sites shall be made by the state

and no contribution shall be paid from state funds for such purposes until:

1. A report and recommendation of the advisory council has been received and considered by the division.

2. The division has determined that there exists historical authencity and a feasible means of providing for the acquisition, preservation, restoration, or operation of such property.

3. The property shall have been approved for such purpose by the division.

(d) Cooperate and coordinate with the Division of Recreation and Parks of the Department of Natural Resources in the operation and management of historic sites and properties subject to the Division of Archives, History, and Records Management.

(3) The division shall employ a state archaeologist, and such other archaeologists as deemed necessary, who shall possess such qualifications as the division may prescribe. The state archaeologist shall be assigned to the Bureau of Historic Sites and Properties and shall serve at the pleasure of the division. The state archaeologist, with emphasis on salvage archaeology, shall conduct an archaeological survey of the state and shall perform such other duties as the chief of the Bureau of Historic Sites and Properties may prescribe.

(4) The division may employ a chief of the Bureau of Historic Sites and Properties. The chief shall possess such qualifications as the division may prescribe but shall be qualified by experience and training to administer the

functions of the bureau and he shall serve at the pleasure of the division. It shall be the duty of the chief, under the general administration of the director, to supervise, direct, and coordinate the activities of the Bureau of Historic Sites and Properties.

History. --s.6, ch. 67-50; ss. 10, 25, 35, ch. 69--106.

267.0615 Historic Preservation Project Review Council; creation; members; membership; powers and duties. --

(1) There is hereby created within the Division of Archives, History, and Records Management the Historic Preservation Project Review Council. The council shall consist of the State Historic Preservation Officer, designated pursuant to Pub. L. No. 89-655, and six additional members to be appointed by the Governor

not later than 60 days after July 1, 1978. Initial appointments shall be for terms as follows: One for 2 years; two for 3 years; and three for 4 years. Thereafter, members shall be appointed for 4-year terms, except for appointments for unexpired terms, in which event the appointment shall be for the unexpired term only. Members may be reappointed. Council members shall be qualified through the demonstration of special interest, experience, or education in historic preservation. At least three members shall possess professional educational credentials representing one or more of the following disciplines: Archaeology, architecture, architectural history, history, or urban planning. A chairman shall be elected by the council's members. The director of the

Division of Archives, History, and Records Management of the Department of State, or his designee, shall serve without voting rights as secretary of the council; and it shall be his responsibility to provide staff assistance to the council. All action taken by the council shall be by majority vote.

(2) It shall be the responsibility of the council to evaluate all proposals for capital outlay involving projects requiring financial assistance from the state, relating to the preservation, restoration, reconstruction, or acquisition of any historical site; and, in making such evaluation, it shall apply, as a minimum standard, the following criteria:

(a) Benefit to the public.

(b) Historical significance.

(c) Site development plan.

(d) Economics.

(e) Maintenance.

(f) Need.

(g) Compatibility with the statewide historic preservation plan. The council shall prepare a report and make recommendations reflecting such evaluation. The report and recommendations of the council shall be filed with the President of the Senate, the Speaker of the House of Representatives, the chairmen of the appropriations committees of both houses of the Legislature, the Secretary of State, and the division. No capital outlay projects shall be eligible for state financial assistance until the council's report and recommendations have been filed with the Division of Archives, History, and Records Management and have received the affirmative recommendation

of the Secretary of State.

(3) The council shall develop and recommend to the Division of Archives, History, and Records Management appropriate rules and regulations relating to the performance of the duties and responsibilities of the council as provided in this act. Upon the adoption of said rules and regulations by the Department of State, the same shall govern the activities of the council. Said rules and regulations shall include, but not be limited to, rules and regulations relating to the following:

(a) The preparation and submission of proposals relating to historic preservation, restoration, recontruction, or acquisition and their evaluation by the council.

(b) Contributions by federal,

state, or local governments and private sources, except that no more than 50 percent of the nonfederal funds for any one capital outlay project shall be funded from state sources. In determining levels of nonstate funding for purposes of this chapter, "funds" may be construed to include the fair market value of real property donated from any source to any bona fide historic preservation board of trustees established under chapter 266.

(c) The preparation and submission of proposals relating to the creation of historic preservation boards of trustees and their evaluation by the council.

(4) It shall further be the responsibility of the council to monitor and evaluate all proposals for state historic preservation boards of trustees

created after July 1, 1976; and, in m,aking such evaluation, the council shall apply, as a minimum standard, the following criteria:

(a) Geographic jurisdiction.--The proposal shall specify geographic boundaries for the jurisdiction of the proposed board. The boundaries shall include at least one Historic Preservation District designated as such on the National Register of Historic Places.

(b) Membership.--The proposal shall specify that no less than one-third of the membership of the board shall possess professional educational credentials representing one or more of the following disciplines: History, architecture, architectural history, urban planning or archaeology.

(c) Architectural review board.--The proposal shall provide evidence in the form of an ordinance or resolution that the local governing body shall empanel and empower an architectural review board as defined by the statutes covering state historic preservation boards of trustees previously created under chapter 266.

(d) Responsibilities and duties; survey, inventory, and preliminary preservation plan.--The proposal shall specify that it shall be the responsibility and duty of the proposed board to perform, as a minimum, the following tasks:

1. To locate and identify through research all historic districts, sites, buildings, structures, and objects of

historical significance, as determined by evaluative criteria of the division, that are contained in the geographic jurisdiction of the board. Within 2 years of the first operational funding of the board, it shall be the duty of the board to have completed a professionally conducted intensive survey and inventory of all historic, architectural, and archaeological sites contained in the geographic jurisdiction of the board. Said survey and inventory shall not be considered complete until it is reviewed and approved by the division.

2. To develop a preliminary historic preservation plan for the area contained in the geographic jurisdiction of the board. Within 6 months of the approval of the survey and inventory by the division, the board shall develop a

preliminary historic preservation plan to be submitted to the division for review and approval.

(e) Economics.--The proposal shall provide evidence in the form of an ordinance or resolution that the local governing body shall participate in the operational funding of the porposed board. The proposal shall specify the annual operating budget of the board and how it shall be funded.

(f) Additional criteria.--

1. Benefit to the public.

2. Need.

3. Compatibility with the comprehensive statewide historic preservation plan as provided for in s. 267.061(2)(b).

History. --s. 1, ch. 73-279; s. 1, ch. 76--93; s. 4, ch. 78-323; s. 1, ch.

78-357.

267.0616 Submission of proposls for state historical preservation boards of trustees required; procedure. --

(1) Any person seeking the creation of a state historic preservation board of trustees shall submit the proposal to the division for review by the Historic Preservation Project Review Council as provided in s. 267.0615(4).

(2) The council shall submit each proposal it receives, together with a report and recommendation by the council regarding such proposal, to the President of the Senate, the Speaker of the House of Representatives, the chairmen of the appropriations committees of both houses of the Legislature, the Secretary of State, and the division.

History. --s. 2, ch. 76-93; s. 2,

ch. 78-357.

267.0617 Historic Preservation Trust Fund. --

(1) There is hereby created within the Division of Archives, History, and Records Management of the Department of State the Historic Preservation Trust Fund, which shall consist of moneys appropriated by the Legislature, moneys deposited pursuant to s. 550.037(2), and moneys contributed to the fund from any other source. The fund shall be administered by the Department of State through the Division of Archives, History, and Records Management for the purpose of this section.

(2) The division is authorized to conduct and carry out a program of grants-in-aid for historic preservation projects that meet the criteria of s.

267.0615(2) and (4) to any department or agency of the state; any unit of county, municipal, or other local government; of any nonprofit corporation or organization meeting the requirements of chapter 617. All moneys received from any source as appropriations, deposits, or contributions to this program shall be paid and credited to the Historic Preservation Trust Fund.

History. --s. 3, ch. 78-357.

267.062 Naming of state buildings and other facilities. --

(1) Except as specifically provided by law, no state building, road, bridge, park, recreational complex, or other similar facility shall be named for any living person.

(2) The Division of Archives, History, and Records Management of the

Department of State shall, after consulting with appropriate citizens' committees, recommend several persons whose contributions to the state have been of such significance that the division may recommend that state buildings and facilities be named for them.

History. --ss. 1, 2, ch. 71-267.

267.071 Bureau of Historical Museums. --

(1) It shall be the duty of the Bureau of Historical Museums to:

(a) Promote and encourage throughout the state knowledge and appreciation of Florida history by encouraging the people of the state to engage in the preservation and care of artifacts, museum items, treasure trove, and other historical properties; the

display and interpretation of historical materials; the marking and preservation of historical or archaeological buildings and sites; the teaching of Florida history in the schools; the conduct and presentation of historical celebrations and dramas; the publicizing of the state's history through media of public information; and other activities in historical and allied fields.

(b) Encourage, promote, maintain, and operate historical museums, including but not limited to mobile museums, junior museums and an historical museum in the state capital.

(c) Organize and administer a junior historian program in cooperation with the Department of Education and other agencies, organizations, historical commissions and associations,

corporations, and individuals, that may be concerned therein.

(2) The Division of Archives, History, and Records Management may employ a chief of the Bureau of Historical Museums. The chief shall possess such qualifications as the division may prescribe but shall be qualified by experience and training to administer the functions of the bureau and he shall serve at the pleasure of the division. It shall be the duty of the chief, under the general administration of the director, to supervise, direct, and coordinate the activities of the Bureau of Historical Museums.

History. --s. 7, ch. 67-50; ss. 10, 35, ch. 69-106.

267.081 Bureau of Publications. --

(1) It shall be the duty of the

Bureau of Publications to:

(a) Promote and encourage the writing of Florida history.

(b) Collect, edit, publish, and print pamphlets, papers, manuscripts, documents, books, monographs, and other materials relating to Florida history, archives, and records management. The Bureau of Publications may establish a reasonable charge for such publications not to exceed the cost of preparation of and publishing said publications.

(c) Cooperate with and coordinate research and publication activities of other agencies, organizations, historical commissions and societies, corporations, and individuals, which relate to archival and historical matters.

(2) The division may employ a chief of the Bureau of Publications. The chief

shall possess such qualifications as the division may prescribe but shall be qualified by experience and training to administer the functions of the bureau, and he shall serve at the pleasure of the division. It shall be the duty of the chief, under the general administration of the director, to supervise, direct, and coordinate the activities of the bureau of publications.

History. --s, 8, ch. 67-50; ss. 10, 35, ch. 69-106.

267.09 Certain powers and duties transferred. --

(1) All powers and duties heretofore set forth in chapter 257, pertaining to the State Library, insofar as they may relate to historical archives or public records as set forth in chapter 257, are hereby transferred to the

division to be administered pursuant to this law.

(2) All the powers and duties heretofore set forth in chapter 592 relating to the Division of Recreation and Parks of the Department of Natural Resources, insofar as they shall relate to historical memorials, shall be transferred to the division to be administered pursuant to this law.

History. --s. 9, ch. 67-50; ss. 10, 25, 35, ch. 69-106.

267.10 Legislative intent. --In enacting this law, the Legislature is cognizant of the fact that there a may be instances where an agency may be microfilming and desroying public records or performing other records management programs, pursuant to local or special acts; the Legislature is further aware

that it may not be possible to implement this chapter in its entirety immediately upon its enactment and it is not the legislative intent by this chapter to disrupt the orderly microfilming and destruction of public records pursuant to such local or special acts above referred to; provided, however, that such agencies make no further disposition of public records without approval of the Divison of Archives, History, and Records Management of the Department of State pursuant to such rules and regulations as it may establish.

History. --s. 11, ch. 67-50; ss. 10, 35, ch. 69-106.

267.11 Designating archaeological sites. --The Division of Archives, History, and Records Management may publicly designate an archaeological site of sig-

nificance to the scientific study or public representationn of the state's historical, prehistorical, or aboriginal past as a "state archaeological landmark." In addition, the division may publicly designate an interrelated grouping of significant archaeological sites as a "state archaeological landmark zone." However, no site or grouping of sites shall be so designated without the express written consent of the private owner thereof. Upon designation of an archaeological site, the owners and occupants of each designated state archaeological landmark or landmark zone shall be given written notification of such designation by the division. Once so designated, no person may conduct field investigation activities without first securing a permit from the division.

History. --s. 1, ch. 73-166.

267.12 Research permits; procedure. --

(1) The division may issue permits for excavation and surface reconnaissance on state lands or lands within the boundaries of designated state archaeological landmarks or landmark zones to institutions which the division shall deem to be properly qualified to conduct such activity, subject to such rules and regulations as the division may prescribe, provided such activity is undertaken by reputable museums, universities, colleges, or other historical, scientific, or educational institutions or societies that posess or will secure the archaeological expertise for the performance of systematic archaeological field research, comprehensive analysis,

and interpretation in the form of publishable reports and monographs, such reports to be submitted to the division.

(2) Those state institutions considered by the division permanently to possess the required archaeological expertise to conduct the archaeological activities allowed under the provisions of the permit may be designated as accredited institutions which will be allowed to conduct archaeological field activities on state-owned or controlled lands within the boundaries of any designated state archaeological landmark or any landmark zone without obtaining an individual permit for each projct, except that those accredited institutions will be required to give prior written notice of all anticipated archaeological field activities on state-owned or controlled

lands or within the boundaries of any designated state archaeological landmark or landmark zone to the division, together with such information as may reasonably be required by the division to insure the proper preservation, protection, and excavation of the archaeological resources. However, no archaeological activity may be commenced by the accredited institution until the division has determined that the planned project will be in conformity with the guidelines, regulations, and criteria adopted pursuant to ss. 267.11-267.14. Such determination will be made by the division and notification to the institution given within a period of 15 days from the time of receipt of the prior notification by the division.

(3) All specimens collected under a

permit issued by the division or under the procedures adopted for accredited institutions shall belong to the state with the title thereto vested in the Division of Archives, History, and Records Management of the Department of State for the purpose of administration and protection. The division may arrange for the disposition of the specimens so collected by accredited state institutions at those institutions and for the temporary or permanent loan of such specimens at permit-holding institutions for the purpose of further scientific study, interpretative displays, and curatorial responsibilities.

History. --s. 1, ch. 73-166.

267.13 Prohibited practices; penalties. --

(1) Any person who shall conduct field investigations on any land owned or controlled by the state or its departments or institutions or within the boundaries of any designated state archaeological landmark or landmark zone without first obtaining a permit or having first received from the division a notice to proceed under the procedures relating to accredited institutions, or any person who shall appropriate, deface, destroy, or otherwise alter any archaeological site or specimen located upon state lands or within the boundaries of a designated state archaeological landmark or landmark zone, except in the course of activities pursued under the authority of a permit or under procedures relating to accredited institutions granted by the division, shall be guilty

of a misdemeanor punishable by a fine not exceeding $500 or by imprisonment in the county jail for a period not to exceed 6 months or both, and in addition, shall forfeit to the state all specimens, objects, and materials collected or excavated, together with all photographs and records relating to such material.

(2) Any person who shall reproduce, retouch, rework, or forge any archaeological or historical object originating from an archaeological site as designated by ss. 267.11-267.14, and deriving its principal value from its antiquity, or make any such object, whether copies or not, or falsely label, describe, identify, or offer for sale or exchange any object, with intent to represent the same to be an original and genuine archaeological or historical

specimen, or any person who shall offer for sale or exchange any object with knowledge that it has previously been collected or excavated in violation of any of the terms of ss. 267.11-267.14 shall be guilty of a misdemeanor punishable by a fine not exceeding $500 or by imprisonment in the county jail for a period not to exceed 6 months or both.

History. --s. 1, ch. 73-166.

267.14 Legislative intent. --It is the declared intention of the Legislature that field investigation activities on privately owned lands should be discouraged except in accordance with both the provisions and spirit of ss. 267.11-267.14; and persons having knowledge of the location of archaeological sites are encouraged to communicate such information to the

the Division of Archives, History, and Records Management.

History. --s. 1, ch. 73-166.